Rules of Conduct for Criminal Defence Lawyers

RULES OF CONDUCT FOR CRIMINAL DEFENCE LAWYERS IN THE EU

A Deontological Approach to Defence Rights

Marelle Attinger

Rules of Conduct for Criminal Defence Lawyers in the EU

A Deontological Approach to Defence Rights

Gedragsregels voor strafrechtadvocaten in de EU

Een gedragsrechtelijk perspectief op verdedigingsrechten

Cover design: Creating4U © www.creating4u.nl

Rules of Conduct for Criminal Defence Lawyers in the EU
A Deontological Approach to Defence Rights

PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Open Universiteit
op gezag van de rector magnificus
prof. dr. Th.J. Bastiaens
ten overstaan van een door het
College voor promoties ingestelde commissie
in het openbaar te verdedigen

op vrijdag 16 oktober te Heerlen
om 16.00 uur precies

door
Marelle Françoise Attinger
geboren op 14 juli 1980 te Alphen aan den Rijn

Promotor:

Prof. mr. dr. G.K. Sluiter	Open Universiteit

Co-promotor:

Prof. mr. S. Brinkhoff	Open Universiteit

Leden beoordelingscommissie:

Prof. E. Cape	UWE Bristol
Prof. mr. J.H. Crijns	Universiteit Leiden
Prof. mr. dr. M. Malsch	Open Universiteit
Prof. mr. dr. R.F.H. Mertens	Open Universiteit
Prof. dr. J.W. Sap	Open Universiteit
Mr. dr. drs. I. van Domselaar	Universiteit van Amsterdam

Voor papa

"There are things we don't want to happen but have to accept,
things we don't want to know but have to learn,
and people we can't live without but have to let go."

~Nancy Stephan, The truth about butterflies: A memoire

Acknowledgements (Dankwoord)

Aan het begin van mijn promotieonderzoek in 2007 bij de Universiteit Maastricht had ik nooit kunnen bedenken dat ik in 2020 mijn manuscript zou afronden aan de Open Universiteit te Heerlen. Dat is eigenlijk maar goed ook, want als ik aan het begin van dit traject geweten had wat voor obstakels ik zou moeten overwinnen, dan was ik er waarschijnlijk niet eens aan begonnen en had ik alle ervaring(en) die ik in de afgelopen jaren heb opgedaan moeten missen.

Gedurende mijn promotietraject heb ik mij gesteund gevoeld door collega's bij de Universiteit Maastricht en de Open Universiteit, vrienden en familie. Veel dank aan een ieder die op zijn of haar geheel eigen wijze bijgedragen heeft aan de totstandkoming van dit proefschrift. Een aantal mensen wil ik met name noemen.

Taru, jij hebt mij kennis laten maken met rechtsvergelijkend onderzoek toen ik als jouw onderzoeksassistent verschillende onderzoeksprojecten met jou heb mogen opzetten en uitvoeren. Dat was een bijzonder leerzame ervaring en heeft er mede toe geleid dat ik in 2007 op dit promotieonderzoek heb gesolliciteerd. Wat me het meest is bijgebleven van onze jarenlange samenwerking is jouw tomeloze nieuwsgierigheid, je energie, je oprechte interesse in je medemens en je scherpe analytische blik. Het eindresultaat van dit promotietraject is weliswaar niet hetgeen jij destijds voor ogen had, desalniettemin hoop ik dat mijn werk je goedkeuring kan dragen. Dank voor alles!

Wilma, in de periode dat je betrokken bent geweest bij mijn onderzoek, heb je me met je eerlijke visie, recht-door-zee mentaliteit en de nodige peptalks steeds dat zetje in de goede richting kunnen geven. Dank je wel daarvoor. Ik kijk uit naar onze verdere samenwerking op het gebied van onderwijs en onderzoek bij de Open Universiteit.

Göran en Sven, jullie zijn het laatste jaar van mijn promotietraject enorm belangrijk geweest. Zonder jullie waardevolle feedback en de motiverende overleggen die we regelmatig hadden, was het me niet gelukt om dit werk af te ronden. Heel veel dank voor jullie inzet en jullie bereidheid om de vele pagina's tekst te becommentariëren!

De leden van de beoordelingscommissie dank ik voor hun bereidheid mijn manuscript te beoordelen.

Peter Caldwell, although it seems ages ago that I had the privilege of joining you in your daily routines as a barrister in London, I still remember vividly those inspiring weeks in London. We went to many different courtrooms in London, you arranged meetings with solicitors and judges and even a few days of marshalling with judges in a Magistrates' and Crown Court. Thanks to you, I was able to experience the English legal practice from quite a few angles, which has been very helpful to my research.

I am also very grateful to Stephen Machon for proofreading my manuscript. You worked incredibly fast and very diligently marked the errors in my English writing. I learned a lot from the way you reviewed my work.

Mijn (oud-)collega's bij de Open Universiteit wil ik allemaal bedanken voor de getoonde interesse in mijn onderzoek en het delen in de vreugde toen ik kon mededelen dat mijn manuscript goedgekeurd was! Twee van hen noem ik in het bijzonder. Dick, heel veel dank dat je altijd bereid was om onderwijswerk van me over te nemen als alles me boven het hoofd dreigde te groeien en te relativeren wanneer ik dat het meeste nodig had! Mijn toekomstige kamergenoot Mark met wie ik een gedeelde passie voor – volgens sommige andere collega's zeer vreemde – muziek heb, wil ik bedanken voor de nodige koppen 'lotgenotenkoffie'. Als geen ander weet jij wat het is om het werken aan je proefschrift met werk en gezin te combineren.

Mijn vrienden en vriendinnen wil ik bedanken voor hun bemoedigende woorden, medeleven, geduld en de broodnodige afleiding als ik weer eens dreigde te verzuipen in mijn werk. Ik weet me omringd door heel veel lieve mensen en dat maakt mij een zeer bevoorrecht mens.

Een speciaal woord van dank aan mijn twee fantastische paranimfen Dorris en Sophia. Lieve Dorris, behalve een geweldige (oud-)collega, ben je vooral een heel goede vriendin. Zonder jouw feilloze gevoel voor humor was mijn tijd bij de Universiteit Maastricht een stuk saaier geweest! Je peptalks, appjes en kaartjes die altijd op precies het goede moment kwamen hebben me echt door die (zeer langdurige) laatste loodjes heen geholpen! Ik hoop in de toekomst nog eens een mooi onderzoeksproject samen te doen.
Lieve Sooph, in een zeer korte tijd hebben wij een vriendschap voor het leven opgebouwd. Je bent er altijd voor mij en Kim in alle ups en downs. Ik ben ongelofelijk trots en blij dat je me tijdens mijn verdediging (ook al is het dan waarschijnlijk vanuit de zaal) bijstaat.

Mama, Michael en Ann-Kristin, dank jullie wel voor jullie hulp met onze kleine handenbindertjes. Zonder jullie had het zeker nog veel langer geduurd voordat dit

proefschrift af was gekomen. Marcel en Kim, dank jullie wel voor jullie luisterend oor als ik weer eens wilde klagen hoe zwaar het leven van een promovenda wel niet is.

Papa, ik mis je. We konden altijd zo fijn praten en ik had zo graag nog meer met je gespard over mijn onderzoek. Ook al was je geen jurist, je wist toch altijd de juiste vragen te stellen waardoor ik net even weer op een ander denkspoor werd gezet. En zelfs toen je er niet meer was, heb je me vaker geholpen. Ik ben ervan overtuigd dat die nachtelijke ingevingen in de laatste fase van mijn onderzoek door jou werden gestuurd. Wat had ik dit moment, dat mijn proefschrift af is, graag met je willen delen en vieren, maar het lot besliste anders. Jij wilde zelf ook nog promoveren, maar dat bewaarde je voor na je pensioen zei je… Aan jou draag ik mijn proefschrift op.

Lieve Douwe, Dennis en Dalí, jullie weten het niet, maar jullie hebben mij door de moeilijkste tijden heen gesleept. Zonder jullie is het leven maar saai! Jullie zijn mijn alles en ik houd van jullie tot aan de maan… en terug!

Lief, uit de grond van mijn hart en meer dan ik in woorden kan uitdrukken dank ik je voor je nimmer aflatende steun, je geduld als ik weer eens enorm prikkelbaar was door slaapgebrek wegens nachten doorwerken en je rotsvaste vertrouwen in mij – ook en misschien juist vooral – in tijden dat mijn zelfvertrouwen het weer eens af liet weten. Zonder jou was dit proefschrift er niet geweest. Met jou naast me kan ik alles aan!

Maastricht, Augustus 2020

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ABS	Alternative Business Structures
BPTC	Bar Professional Training Course
BSB	Bar Standards Board
CBA	Criminal Bar Association (England and Wales)
CCBE	Council of Bars and Law Societies of Europe
(C)ILEX	(Chartered) Institute of Legal Executives
CJEU	Court of Justice of the European Union
CJPOA	Criminal Justice and Public Order Act
CLSA	Criminal Law Solicitors' Association
CPD	Continuous Professional Development
CPIA	Criminal Procedure and Investigations Act 1996
CPS	Crown Prosecution Service
CrimPR	Criminal Procedure Rules
ECHR	European Convention on Human Rights
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GC	Grand Chamber
IBA	International Bar Association
LARN	the Legal Aid Reformers' Network
LSB	Legal Services Board
LSC	Legal Services Commission
NVSA	Association of Dutch Criminal Defence Lawyers
PACE	Police and Criminal Evidence Act 1984
PCMH	Plea and Case Management Hearing
PDS	Public Defender Service
QASA	Quality Assurance Scheme for Advocates
QC	Queen's Counsel
SAHCA	Solicitors' Association of Higher Court Advocates
SRA	Solicitors' Regulation Authority
Statute	Statute for criminal defence lawyers
Voda	Decree on the Legal Profession

CHAPTER 1
General Introduction

1 Introducing the Research Subject

Cross-border cooperation between police and judicial authorities across the European Union (EU) has significantly increased in recent years.[1] This means that criminal defence lawyers will also increasingly have to deal with cross-border defences. Consequently, criminal defence lawyers will have to collaborate with colleagues from abroad in order to organise and coordinate the defence. To foster such collaboration, it is of great importance that lawyers respect and understand each other's criminal justice systems and corresponding deontological regulations.[2] Furthermore, research on the position and role of the lawyer in today's society is relevant, given the "increase of attacks on the profession in recent years".[3] This trend has come to the attention of several members of the Parliamentary Assembly of the Council of Europe who signed a motion inviting the Committee of Ministers to initiate work on drafting a European Convention on the profession of lawyer.[4] Consequently, the Council of Bars and Law Societies of Europe (CCBE) has made a contribution to this proposed convention explaining the importance of such a convention in order to protect lawyers from undue pressure from executive and legislative powers, judiciary and non-State actors to ensure their professional independence and therewith their essential role in supporting the rule of law. Moreover, according to the CCBE, a separate convention for lawyers is needed because not all rights associated with the lawyer's role are protected under the European Convention on Human Rights (ECHR).[5] These documents primarily focus on the protection of the position of lawyers as intermediaries between the public and the courts, while this

[1] Survey conducted by the TNS Opinion and Social at the request of the European Commission, "Europeans' attitudes towards security", Special Eurobarometer 464b, December 2017, p. 40.
[2] See Spronken 2003.
[3] CCBE Info No. 66, October 2017.
[4] Parliamentary Assembly of the Council of Europe, Doc. 14181 Motion for a recommendation "The case for drafting a European Convention on the profession of lawyer" (13 October 2016). This motion was signed by 22 members of the Parliamentary Assembly (Armenia, Austria, Azerbaijan, Estonia, France, Georgia, Germany, Latvia, Luxembourg, Norway, Spain, Switzerland and Ukraine). See also Recommendation 2085 (2016) and Recommendation 2121 (2018) of the Parliamentary Assembly.
[5] CCBE contribution on the proposed European Convention on the Profession of Lawyer, 15 September 2017 (available at https://rm.coe.int/ccbe-contribution-european-convention-profession-lawyer-20170915-eng/168078f2f6). According to the CCBE, the convention should be drafted as an open convention and modelled on the scope of Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer of 25 October 2000.

research focuses on the *conduct* of *criminal defence* lawyers and therewith provides a basis for effective collaboration between criminal defence lawyers when dealing with cross-border defences. At the same time, one should realise that these positions are inextricably linked.

Much research has already been conducted regarding the position of suspects and accused persons in criminal proceedings and the defence rights that need to ensure effective and fair criminal proceedings.[6] This research complements the already existing research by an extensive, EU-wide research on the conduct of criminal defence lawyers focusing on the deontological aspects of regulations governing the conduct of criminal defence lawyers in criminal proceedings. The outcome of this research aims to contribute to a fundamental discussion on increased cooperation between criminal defence lawyers practising across the EU, on provision of an effective defence to accused persons and on the guarantees required on an EU level in general and by national governments in particular to enable criminal defence lawyers to effectively perform their professional duties. Additionally, this research could be a starting point for more in-depth comparative research on a smaller scale into the relationship between deontological regulations and the organisation of the criminal justice systems. Such more in-depth research could further explore and analyse the link between the role and position of criminal defence lawyers in criminal proceedings and the organisation of the criminal justice system.[7] In this research this link is illustrated by explaining how selected deontological issues are dealt with in England and Wales[8] and the Netherlands. These Member States were selected because they represent two very different legal traditions: common law and civil law. More information on these two Member States is provided in Chapter 3.

This research aims to contribute to a fundamental discussion amongst criminal defence lawyers and academics about what their professional input should be in delivering an effective legal representation of suspects and accused persons in criminal proceedings. However, criminal defence lawyers are also often dependent on the facilities offered by judicial authorities, prosecution and the government to properly perform their duties. In this regard, the Directive on the right of access to a lawyer in criminal proceedings[9] (the Directive) provides in recital 51 that:

> "The duty of care towards suspects or accused persons who are in a potentially weak position underpins a fair administration of justice. *The prosecution, law*

[6] See for example: Cape et al. 2007; Cape et al. 2010; Cape & Namoradze 2012; Flynn et al. 2016; Hodgson 2011; McConville et al. 1994; Spronken & Attinger 2005; Spronken et al. 2009.
[7] Spronken 2001, p. 629.
[8] Since the official Brexit date is set at 31 January 2020, reference is still made in this research to the United Kingdom as an EU Member State.
[9] Directive 2013/48/EU, OJ L (2013) L 294/1. According to Art. 15 of this Directive, the Member States were to have implemented the provisions of the Directive by 27 November 2016.

> *enforcement and judicial authorities should therefore facilitate the effective exercise by such persons of the rights provided for in this Directive*, for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to have a third party informed upon deprivation of liberty, and by taking appropriate steps to ensure those rights are guaranteed." [author emphasis added]

This research could therefore also serve as an impulse for a discussion amongst legal professionals, judicial authorities and Member States to consider the framework for criminal defence lawyers to enable them to offer effective legal assistance to suspects and accused persons in criminal proceedings. This shows that this research is by no means intended to delimit the professional's freedom of movement. Rather it aims to unravel the conditions needed to offer an effective criminal defence from the perspective of the criminal defence lawyer and to stress the responsibilities that come with the important position allocated to the criminal defence lawyer in criminal proceedings.

1.1 The Effective Defence Triangle

The right to an effective legal defence is the cornerstone of all other fundamental rights in democracy and more particularly in criminal proceedings, based on the rule of law[10] and as such it is a precondition for effective criminal defence.[11] It is evident that without proper legal assistance, a suspect is less likely to be aware of all his[12] procedural defence rights, thus rendering a criminal defence not very effective. The suspect has the right to an effective defence and the criminal defence lawyer has a professional duty to offer effective legal assistance in his efforts to "further the development of law and to defend liberty, justice and the rule of law".[13] This professional duty was also formulated by the European Court of Human Rights (ECtHR) in *Dayanan*:

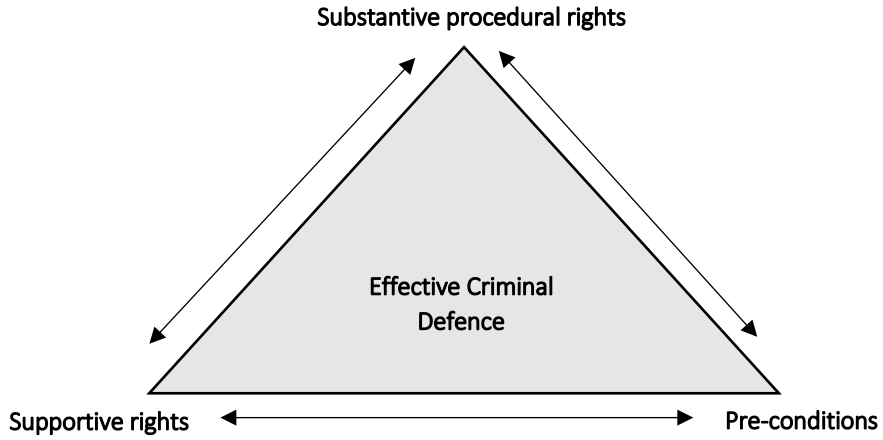
> "Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of

[10] Commentary on Charter of Core Principles CCBE, sub 1.; Commentary on IBA Principles; see also for example Spronken 2003, p. 53; Cape et al. 2010, p. 58, Blackstock et al. 2014, p. 12
[11] Cape et al 2010, pp. 577-578.
[12] For the sake of readability, any reference in this research to 'he' also includes 'she'.
[13] Commentary on IBA Principles 2011, Introduction.

> evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention." [14]

Indirectly, the ECtHR urges governments to guarantee practical and effective exercise of procedural rights, such as the right to information, confidential communication with a lawyer and adequate preparation of the defence. Fundamental aspects of the suspect's defence concern not only purely legal matters, but also matters of a more social nature ("supporting the accused in distress") and practical nature ("checking the conditions of detention"), which shows a much broader spectrum of the criminal defence lawyer's occupation. With this quote, the ECtHR illustrates the complexity and versatility of criminal defence lawyers' role and position in criminal proceedings. It also shows that the concept of 'effective criminal defence' consists of many interwoven (fair trial) rights.

In 2010, a research team further defined the concept of 'effective criminal defence' and developed a model to explicate the relation between the different (fair trial) rights and aspects of this concept: the 'Effective Criminal Defence Triangle'.[15] This triangle illustrates the interrelation between three different components of an effective criminal defence, namely substantive procedural rights, supportive rights and pre-conditions:



The *substantive procedural rights,* including the right to a fair trial, are paramount in ensuring effective criminal defence and therefore are placed at the top of the triangle: the presumption of innocence (Article 6 § 2 ECHR), the right to silence (and the privilege against self-incrimination),[16] equality of arms between prosecution and defence,[17] the right to an

[14] ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*), § 32.
[15] Cape et al 2010, p. 577 et seq.
[16] ECtHR 25 February 1993, ECLI:CE:ECHR:1993:0225JUD001082884 (*Funke/France*) and ECtHR 19 March 2009, ECLI:CE:ECHR:2009:0310JUD000437802 (*Bykov/Russia*).
[17] ECtHR (GC) 12 May 2005, ECLI:CE:ECHR:2005:0512JUD004622199 (*Öcalan/Turkey*), § 140.

adversarial procedure,[18] and more specific rights relating to criminal defence: the right to defend oneself (Article 6 § 3 (c)) ECHR), to be present at hearings, to information on the accusation and the file (Article 6 § 3 (a) ECHR), to call and question witnesses and experts (Article 6 § 3 (d) ECHR) and the right to appeal (Article 2, ECHR Seventh Protocol). Criminal defence can furthermore only be effective when the accused is granted several procedural safeguards. These are referred to in the triangle as *supportive rights*, such as the right to information on defence rights, caution of the right to silence, bail, adequate time and facilities to prepare the defence (Article 6 § 3 (b) ECHR), the right to investigate the case, and the right to decisions substantiated with reasons and procedural enforcement mechanisms. Lastly, the triangle contains several *pre-conditions for an effective criminal defence*, without which criminal defence can hardly be considered effective: the right to interpretation and translation (Article 6 § 3 € ECHR), the right to legal assistance (Article 6 § 3 (c) ECHR), defence culture, quality control[19] and the legal aid system. In the rationale of this Effective Defence Triangle the effectiveness of criminal defence depends not only on all three corners of the triangle being represented in a criminal justice system, but also on the rights and elements being expressed in sufficient detail and supported by "appropriate enforcement mechanisms and judicial cultures".[20]

This research focuses on the right to legal assistance, which – according to the Effective Defence Triangle – is one of the pre-conditions for an effective defence. It elaborates on already existing research in the field of (effective) criminal defence[21] by focusing on the deontological regulations which provide guidance for criminal defence lawyers in determining their conduct when assisting suspects and accused persons in criminal proceedings.

1.2 Explaining the EU Dimension

In an era of a growing urge to secure and protect society against threats of terrorism, organised (cyber)crime, the challenge most criminal justice systems face is how to strike a balance in criminal proceedings between the interests of crime control and procedural

[18] ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002354194 (*Garcia Alva/Germany*); ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002511694 (*Schöps/Germany*); ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002447994 (*Lietzow/Germany*); and ECtHR 9 July 2009, ECLI:CE:ECHR:2009:0709JUD001136403 (*Mooren/Germany*), § 124-125.

[19] The ECtHR clearly stated that it regards assessment of the quality of legal assistance beyond its proper, constitutional compass (ECtHR 24 November 1993, ECLI:CE:ECHR:1993:1124JUD001397288 (*Imbrioscia/Switzerland*).

[20] Cape et al 2010, p. 578

[21] See for example: Cape et al. 2007, Cape and Namoradze 2012, Prakken & Spronken 2009, Schumann et al. 2012, Vermeulen 2012.

safeguards.[22] Where suspects and accused persons find themselves confronted with powerful police and judicial authorities, criminal defence lawyers have an important part to play in counterbalancing this power and safeguarding fundamental rights and freedoms. The European Council adopted the Stockholm Programme in 2009 to create an area of freedom, security and justice, with due respect for fundamental rights and freedoms. The key component of this Programme is the Roadmap for strengthening procedural rights for suspected and accused persons in criminal proceedings (the Roadmap).[23] By introducing separate measures within the Roadmap, the Council chose a step-by-step approach, honouring the importance and complexity of the issues that need to be addressed by the Roadmap.[24] The priority issues of the Roadmap are captured in six 'measures', although this list is not exhaustive:[25]

- Measure A: interpretation and translation;[26]
- Measure B: information on rights and information about the charges;[27]
- Measure C: legal advice and legal aid;[28]

[22] Survey conducted by the TNS Opinion and Social at the request of the European Commission, *"Europeans' attitudes towards security"*, Special Eurobarometer 432, April 2015 (it can be downloaded from the website of the European Commission on the Public Opinion page: http://ec.europa.eu/public_opinion/archives/eb_special_439_420_en.htm#432). The survey was carried out between 21 and 30 March 2015 in 28 Member States with in total 28,082 respondents from different social and demographic groups, who were all interviewed face-to-face in their own homes; follow up on this survey conducted by the TNS Opinion and Social at the request of the European Commission, "Europeans' attitudes towards security", Special Eurobarometer 464b, December 2017 (it can be downloaded from the website of the European Commission on the Public Opinion page: http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/1569). The survey was carried out between 13 and 26 June 2017 in 28 Member States. Some 28,093 EU citizens from different social and demographic categories were interviewed face-to-face at home and in their native language; Communication from the Commission to the European Parliament, the European Council and the Council, delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, Brussels 20 April 2016, COM(2016) 230 FINAL. Cooperation extends outside EU borders (p. 16); Survey conducted by the TNS Opinion and Social at the request of the European Commission, "Europeans' attitudes towards security", Special Eurobarometer 464b, December 2017, pp. 15 and 40.

[23] Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings (1 July 2009), document No. 11457/09 DROIPEN 53 COPEN 120.

[24] Revised note from the Presidency to the Council for the Council meeting on 23 October 2009, document No. 14552/1/09 DROIPEN 125 COPEN 197, p. 6.

[25] Jimeno-Bulnes 2010, p. 7.

[26] Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 *on the right to interpretation and translation in criminal proceedings* (OJ L (2010) 280/1).

[27] Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 *on the right to information in criminal proceedings* (OJ L (2012) 142/1).

[28] The right to legal advice and the right to legal aid were originally to be dealt with together under Measure C. It was, however, decided to separate the two and to combine the right to legal advice with the right to communication upon arrest, which resulted in Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 *on the right of access to a lawyer in criminal*

- Measure D: communication with relatives, employers and consular authorities upon arrest;[29]
- Measure E: special safeguards for suspected and accused persons who are vulnerable;[30] and
- Measure F: a green paper on pre-trial detention.[31]

With regard to this research, measure C is most relevant. In October 2013, the European Parliament and Council gave effect to this measure by adopting the already mentioned Directive on the right of access to a lawyer in criminal proceedings.[32] The Directive builds on standing case law of the ECtHR on access to legal assistance in early stages of criminal proceedings and particularly explicates the right of the suspect to consult a lawyer prior to, and have a lawyer present during, police interrogation.[33] The implementation of the Directive means that Member States will have to reconsider the regulations granting access to a lawyer during pre-trial proceedings (specifically access to a lawyer before and during police interrogation). Moreover, Member States will have to re-evaluate the regulations on legal aid, since most of the legal assistance in criminal proceedings, particularly pre-trial, is provided on the basis of legal aid.[34]

Counsel's attitude when present during police interrogation is crucial. Even if national regulations limit counsel's ability to assist his client, for example by providing that he may not say or do anything during the interrogation and that he may not make any physical contact with his client, counsel should realise that his mere presence in the interrogation

proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L (2013) 294/1); Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings* (OJ L (2016) 297/1).

[29] This measure has been implemented in Directive 2013/48/EU.

[30] Directive 2016/800/EU of the European Parliament and the Council of 11 May 2016 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings* (OJ L (2016) 132/1).

[31] European Commission, *Green Paper on Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, Brussels 14 June 2011, COM(2011) 327 final.

[32] Directive 2013/48/EU, OJ L (2013) L 294/1. According to Art. 15 of this Directive, the Member States were to have implemented the provisions of the Directive by 27 November 2016.

[33] The Directive also provides for a right to legal assistance during evidence-gathering acts such as home searches by the police and identity parades, even when the suspect is not deprived of his liberty (Article 3). This Article will be discussed more thoroughly in Chapter 2.

[34] This is also the reason why Measure C originally included both the right to access to a lawyer and the right to legal aid. During negotiations it was, however, already painfully clear from the start that the measure had to be divided up because it would otherwise be virtually impossible to reach an agreement.

room could be of great importance to the client.[35] The client knows that he is not alone and feels psychologically supported by the presence of his legal representative. It might be easier for him to resist pressure from the interrogating officers and he knows he may request legal advice at any time. Moreover, personal contact between the suspect and the criminal defence lawyer might strengthen the confidential lawyer-client relationship, which is an important precondition for building an effective defence. It might, however, be difficult for counsel to assume this position, when he feels that he should be more active and present during this stage of the proceedings and not merely supporting his client silently. This also touches upon the deontological question to what extent the criminal defence lawyer should accept such restrictions and if he refuses to accept them, what should he do then? Is it evident that he has to act only in the interest of his client, or is this duty also limited?

When the pre-trial stage in criminal proceedings becomes increasingly important, criminal defence lawyers may need to reorganise their line of work and change their professional attitude. The challenges faced by a criminal defence lawyer when assisting the suspect prior to and during police interrogation have already been addressed. Another example is dealing with situations in which the criminal defence lawyer does not have (all) case material available and still has to advise his client on his defence position. Questions arise such as how to advise clients on making use of their right to remain silent and how to advise on entering a plea of guilty? Such questions are not easily answered without sufficient knowledge of the prosecution's position. Yet another example concerns contacting witnesses pre-trial. In order to properly advise the suspect or accused person on his defence strategy, it can be helpful to contact witnesses. But what if regulations prohibit criminal defence lawyers from contacting witnesses pre-trial?

A complicating factor is that in the majority of the cases, suspects will be provided with legal assistance on a legal aid basis.[36] Yet, remuneration in legal aid cases, particularly legal assistance provided in pre-trial proceedings, is not always sufficient to cover the rising costs of criminal legal aid. This may place the lawyer in a difficult ethical dilemma because he might have to choose between his own (financial) interests and the interests of the client to receive proper and effective legal assistance. As such, it may be presumed that the Directive will have an impact on the conduct of criminal defence lawyers.

Although some might argue that effective legal assistance provided to suspects and accused persons constitutes obstacles to criminal justice, its contribution to the effectiveness

[35] See for an in-depth comparative empirical study on police station representation of suspects: Blackstock et al. 2014.

[36] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the Proposal for Measures on Legal Aid for Suspects or Accused Persons in Criminal Proceedings /* SWD/2013/0476 final */, par. 4.1.1: "According to stakeholders, the vast majority of those arrested in the EU have insufficient means to pay for a lawyer; sufficient legal aid is therefore a crucial part of the right to access legal advice and representation."

of the criminal justice system should not be trivialised.[37] In fact, when criminal defence lawyers get involved early in the criminal proceedings, they will be able to help improve the quality of the process of evidence gathering and in doing so most likely prevent miscarriages of justice. In sum, it can be argued that effective criminal defence contributes to a fair administration of justice. The question is, however, what does the defence lawyer need to effectively represent the accused and how can the quality of this defence be assured?[38] Although the Directive provides some guidelines on what is defined as 'active participation' in criminal proceedings, namely that "the lawyer may […] ask questions, request clarification and make statements",[39] it does not provide any explicit provisions on the independence of criminal defence lawyers or standards for their conduct. Unlike, for example, the Directive on the right to interpretation and translation in criminal proceedings,[40] which provides in Article 5 that Member States have to take appropriate measures to ensure that the interpretation and translation meets a certain quality, the Directive does not contain any provisions on the quality of services delivered by criminal defence lawyers.[41]

2 Introducing the Research Question

It is presumed that the criminal defence lawyer's professional obligation is to search continuously and fearlessly for the boundaries of the permissible, especially when police and prosecution do the same.[42] The question is what conduct of the criminal defence lawyer is considered still permissible? What deontological regulations are currently in place to delimit this area of permissibility in the EU Member States?

Keeping in mind that cross-border prosecution is increasing and consequently that criminal defence lawyers will have to cooperate with colleagues in other Member States in coordinating the defence,[43] it is important to research the extent to which these

[37] ECBA Touchstones – Minimum Standards for the right to Legal Aid (Measure C part 2), 25 June 2013: http://www.ecba.org/content/index.php?option=com_content&view=category&layout=blog&id=75&Itemid=25. See also the Commentary on the Charter of Core Principles of the CCBE, sub 6. The importance of effective legal assistance, especially in early stages of the proceedings, is very nicely illustrated by an English case, which is discussed in Cape et al. 2010, p. 581-583.

[38] See Soo 2016, Soo 2017-I, Soo 2017-II and Soo 2017-III for a comprehensive analysis of the right to effective remedy when the right to access to a lawyer is violated (Directive 2013/48/EU, Art. 12).

[39] Directive 2013/48/EU, recital 25.

[40] Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ (2010) L 280/1.

[41] Cape and Hodgson 2014, p. 461; Blackstock et al. 2014, p. 32.

[42] Spronken 2001, pp. 151–155.

[43] Lawyers are allowed to act and establish themselves in other EU Member States than their own. This is regulated by Council Directive 77/249/EEC of 22 March 1977, to facilitate the effective exercise by lawyers of freedom to provide services, JO 1977 L 78/17; Council Directive 89/78/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of

deontological regulations show differences and similarities across the EU. This way it will be possible to initiate an exploration of the common ground in deontological regulations for criminal defence lawyers within the EU, which is vital for a better understanding of effective legal representation in cross-border criminal cases. After all, according to the Code of Conduct for European Lawyers, when acting in another EU Member State, lawyers have to cooperate with a lawyer from the host state and "take into account the differences which may exist between their respective legal systems and the professional organisation, competences and obligations of lawyers in the Member States concerned".[44] An additional question is: do the existing deontological regulations offer criminal defence lawyers a sufficient basis to offer an effective criminal defence to their clients?
This led to the following central research question:

What should be the essential components for an EU system of regulations governing the conduct of criminal defence lawyers who provide legal assistance to suspects and accused persons in criminal proceedings, taking into account the normative framework of Articles 6, 8 and 10 ECHR, relevant EU law, and the core principles of criminal defence lawyers in order to provide an effective defence?

In order to answer this central research question it is first necessary to map out the minimum standards for effective defence, with a specific focus on the role and position of the criminal defence lawyer. Secondly, essential components of an EU system of regulations can only be identified when the deontological regulations for criminal defence lawyers that exist throughout the EU are mapped out. Thirdly, the components which are essential to regulating the conduct of criminal defence lawyers on EU level are best identified with a thorough analysis of these deontological regulations. Such analysis should comprise a comparison of the regulations in order to identify differences and similarities and a comparison of the normative framework in order to determine whether they contribute to an effective defence. This led to the following sub-research questions:

professional education and training of at least three years' education, OJ 1989 L 19/16 and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ 1998 L 77/36.

[44] Art. 5.2.2 Code of Conduct for European Lawyers. This Code of Conduct was adopted at the Plenary Session of the Council of Bars and Law Societies of Europe (CCBE) held on 28 October 1988 and subsequently amended during the CCBE Plenary Sessions on 28 November 1998, 6 December 2002 and 19 May 2006.

1. What is the normative framework on a European and an EU level for the regulation of criminal defence lawyers' conduct in providing an effective defence to suspects and accused persons in criminal cases?
2. What deontological regulations, particularly applicable to criminal defence lawyers, can be identified in the EU Member States?
3. What are the differences and similarities between the regulations as identified across the EU? What can be concluded about the compatibility of these regulations with the normative framework?

This research does not aim to provide minimum standards for an effective defence, simply because these are already generally provided in international and regional regulations, such as the ECHR, the EU Charter on Fundamental Rights (the EU Charter), several specific EU Directives to which reference has already been made above, and the practical development of these regulations in ECtHR case law and to a lesser extent in case law of the Court of Justice of the European Union (CJEU). These minimum standards thus form an important part of the normative framework.

3 The Normative Framework

Although the normative framework is more thoroughly discussed in Chapter 2, it is already briefly introduced here in order to further delineate the context of this research. The normative framework consists of a procedural and a deontological element. The procedural element concerns the minimum standards for effectuation of the right to legal assistance as laid down in European and EU legislation. A selection has been made of relevant provisions of the ECHR, the EU Charter and several EU Directives. These provisions concern the right to a fair trial, particularly the right to legal assistance, which is laid down in Article 6 § 3 (c) ECHR and Article 47 (second paragraph) EU Charter. It is furthermore elaborated in the EU Directive on the right to access to a lawyer in criminal proceedings.[45] Also, Article 8 ECHR, the right to privacy, is relevant in light of confidential lawyer-client communication and lastly, Article 10 ECHR codifies the right to freedom of expression, which is relevant because it relates to the role of the criminal defence lawyer as spokesperson. Since the wording of these provisions is quite general, analysis of these provisions is not complete without a description of relevant ECtHR and CJEU case law. The way in which these norms are formulated indicates that they are primarily addressing governments to offer enough facilities and procedural safeguards

[45] EU Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty of 22 October 2013 (2013/48/EU), OJ L 294/1.

for the suspect and accused person to actually conduct his defence effectively. These norms, however, can also be interpreted as norms for criminal defence lawyers to determine their conduct in their relationships with clients, the government, courts, public authorities and society as a whole in order to effectively assist their clients and represent them in criminal proceedings before the court. The emphasis in this research is on the deontological aspects and application of these norms by criminal defence lawyers.

The deontological element of the framework consists of the five core principles for lawyers: independence, partiality, confidentiality, professionalism and integrity. These core principles are laid down in several international and European deontological regulations such as the CCBE Code of Conduct and Charter, the International Bar Association Principles, the Havana Declaration and codes of conduct for defence counsel in international tribunals and can also be recognised in the codes of conduct for lawyers in each EU Member State. These core principles lie at the basis of what is considered to be proper legal professional conduct, which means that criminal defence lawyers have to adhere to these core principles in their daily practice. Moreover, the legal assistance offered to suspects and accused persons can only be considered effective when these core principles are taken into consideration.

The working field of the criminal defence lawyer is complex and following the two elements of the normative framework as described above it can be concluded that the criminal defence lawyer basically has to assume four different roles while defending suspects and accused persons in criminal proceedings, namely the role of legal representative, strategic adviser, trusted counsellor and spokesperson. He will have to fulfil those roles simultaneously, although depending on the activity required from the criminal defence lawyer emphasis may be on one particular role. The division in four different roles allows a more comprehensible analysis of the regulations governing the conduct of criminal defence lawyers.

4 Research Methodology and Outline

This research was conducted in two stages. The first stage consisted of data gathering through desk research, including relevant literature, case law, regulations and codes of conduct. In order to differentiate between relevant data, the categorisation of the four roles of the criminal defence lawyer was used to scrutinise the massive body of data available. It should be noted here that this stage of the research was subject to some practical limitations. First, not all codes of conduct were available in English, German, Dutch or French. Consequently, information from Greece, Hungary and Portugal could not be included in this dataset. Second, due to its broad geographical scope, since this research aims to provide an EU-wide overview, this dataset was limited to *deontological* regulations. *Procedural* regulations were not incorporated in the dataset. This was a deliberate choice because it

would be nearly impossible to also scrutinise all national procedural regulations. The language barrier also played an important part in this decision, since procedural regulations are mostly only available in the original language of the Member State.

Using what is known as the 'snowball' method, already existing (comparative) research on legal ethics, the legal profession and criminal defence lawyers in particular and on the position of suspects in criminal proceedings was used as a starting point and relevant references in the footnotes were checked for further research. The same method was used to acquire a dataset of relevant case law.

Data was also collected by scrutinising general codes of conduct for lawyers in the individual EU Member States for regulations applicable to criminal defence lawyers. The codes of conduct are publicly available through the internet and particularly the website of the CCBE[46] proved to be an important source of information since it maintains a database with all the (translated) national codes of conduct and laws on the Bars. Data gathering was not limited to the general codes of conduct, but also involved identification of specific sets of deontological regulations for criminal defence lawyers, which were identified in Austria, England and Wales, Germany, the Netherlands and Scotland. Furthermore, the dataset was supplemented with information on the organisation of the (criminal) Bar, and training and education of criminal defence lawyers. In order to make this vast amount of information manageable, a country report was written for each Member State. To validate this information, these country reports were discussed with national criminal defence lawyers of the respective Member States. Their feedback and comments were used to fine-tune the country reports. The results of this part of the research are presented in Chapter 3.

The second stage of the research consisted of comparative analysis and synthesis. Comparative research requires that one is aware of the notion that the way a legal system is organised is influenced by historical development, political changes and legal traditions. Usually, researchers therefore divide the Member States that are included in their research into what is referred to as legal families.[47] In light of the ambition and scope of this research, all EU Member States were included and comparison and analysis of all the relevant regulations was based on the normative framework, which is further explained in Chapter 2. Since this normative framework transcends individual Member States, the need for a division into legal families has been less urgent in this research. The identified regulations as presented in Chapter 3 were compared to ascertain the commonalities and differences. Moreover, the regulations were tested against the normative framework in order to establish whether these regulations comply with the concept of effective defence. This comparative analysis and synthesis is presented in Chapter 4.

[46] See: http://www.ccbe.eu/
[47] See for example Nijboer 2005, p. 33 (including references).

5 Terminology

For the sake of readability, any reference to "he" also includes "she". Comparative legal research presents certain challenges regarding the use of legal terminology. Criminal justice systems across the EU vary considerably. Procedural and deontological regulations use different terminology and terminology that seems similar to the eye may have different legal meanings. Certain terms that are used in this research therefore require preliminary explanation, which will be provided here. It should be noted in general that terminology in this research is used pragmatically; meaning that discussion of the origin or different meanings of a term is avoided. Instead, terminology in this research is used in a functional manner, so as to transcend the differences that occur due to different legal systems.

Firstly, the term "suspect" is used differently in the various criminal justice systems. In the Netherlands the term is translated as '*verdachte*' referring to a person against whom a (strong) suspicion exists that he may have committed a criminal offence.[48] The person is called '*verdachte*' throughout criminal proceedings. However, English legal language uses different terms to refer to a 'suspect' depending on the stage of criminal proceedings. In the stage before being charged, a 'suspect' is referred to as *suspect*, while after being charged he is referred to as *accused* and at the trial stage he is referred to as *defendant*. Since these distinctions are not crucial for the analysis in this research, because it focuses predominantly on the professional conduct of criminal defence lawyers and not much on the position of the suspected person in criminal proceedings, the terminology most commonly used in the context of the EU is also used in this research: 'suspects' and 'accused persons'. In that regard, the term 'suspects' is used for persons who are at the very beginning of the criminal process and throughout pre-trial proceedings and 'accused persons' is the general reference. The term defendant will only be used if it is clear from the context that it concerns the trial phase of proceedings.

Secondly, the term "charge" in English criminal proceedings refers to a significant moment in criminal proceedings, since suspects are usually only charged from the moment the police consider that there is enough evidence for a successful prosecution. After being charged, usually the suspect will not be interviewed any further.[49] In Dutch criminal proceedings there is not an official moment of 'charge'; the criterion of suspicion is determinative. When relevant, the exact moment in criminal proceedings will be defined so that the use of the term *charge* is not susceptible to multiple interpretation.

A third term frequently used in this research is the term "criminal defence lawyer". Although legal assistance to accused persons in criminal proceedings is provided by no one group of lawyers, reference will be made to all these professionals as criminal defence

[48] Art. 27 CCP.
[49] Cape et al. 2007, p. 16.

lawyers for the sake of readability. When in this research the term criminal defence lawyer is used, this may include legal executives, legal advisers, solicitors, solicitor-advocates, barristers, police station representatives and paralegals, although some of them may not be 'lawyers' in the strict sense.

Fourthly, there is a distinction between "hearings" and "trials", which is particularly relevant in the English criminal justice system. If a case goes to trial, this means that evidence will be presented, witnesses are heard and a decision has to be made on the guilt or innocence of the accused person. Hearings refer to all other sessions in court, for example the Case and Plea Management Hearing, in which it is determined which witnesses will be called to testify in court and what the plea of the accused is going to be. Another example is the sentence hearing, in which the sentence is determined after a guilty verdict or guilty plea and in which defence counsel will have to plead circumstances of mitigation. This distinction is particularly relevant when discussing criminal justice systems that allow for the possibility of plea bargaining.

6 Finalisation of the Research

The subject matter of this research is complex, dynamic and particularly relevant in current times, when the EU and national governments are putting the creation of safe and secure societies high on their political agenda. This means that the subject matter of this research is continuously evolving. At some point, however, a line had to be drawn to also delimit the research in time. Data research was finalised on 20 December 2019, which means that any regulation, legislation, case law, review or report issued after this date has not been incorporated in this research, unless its content was of such fundamental importance to the subject matter of this research that it could not be ignored. All websites referred to in the footnotes were last accessed in the period from 1 December to 31 December 2019 inclusive.

CHAPTER 2
The Normative Framework

1 Introduction

In this Chapter the normative framework will be outlined, which will be used to analyse the research results as presented in Chapter 3. This normative framework consists of two elements:

1. the minimum standards for offering an effective defence as they exist on European and EU level and
2. the core principles that lie at the basis of the conduct of legal professionals as far as these principles are relevant to explain what is 'proper conduct' as is expected from (criminal defence) lawyers.

Both elements are necessary to create the normative framework. The lawyer needs to offer legal assistance in a manner that contributes to an effective criminal defence. Therefore, the lawyer not only needs to know what the legal framework for this effective criminal defence is (procedural element of the framework), but also what the deontological framework is for actually providing effective legal assistance (deontological element of the framework).

1.1 Plan of Discussion

The minimum standards for an effective criminal defence as they are provided by the ECHR, EU Directives and EU Charter (including ECtHR and CJEU case law) are outlined in paragraph 2, followed by an overview of the core principles and overarching European and international codes of conduct for lawyers in paragraphs 3 and 4. In paragraph 4, the two elements will be combined so that the normative framework regarding the four roles of the criminal defence lawyer as legal representative, strategic adviser, trusted counsellor and spokesperson becomes clear.

2 The Procedural Element

It is common knowledge that the jurisprudence of the ECtHR is very case-centred. This means that one should be careful drawing general conclusions from ECtHR case law. For example, the decision whether or not there has been a breach of the right to legal assistance (Article 6 § 3 (c) ECHR) in the pre-trial phase largely depends on specific features of the proceedings

and on the particular circumstances of the case.[1] In each case, the ECtHR will consider whether the proceedings as a whole have been fair to the accused.[2] This means that a breach of Article 6 ECHR in the pre-trial proceedings, does not necessarily lead to an infringement if the accused has not been impaired in exercising his defence rights taking into account the procedure as a whole.

With these limitations in mind, the scope of the right to a fair trial has been explored. Specific attention has been paid to the right to defend oneself or through legal assistance of one's own choosing (Article 6 § 3 (c) ECHR); the right to privacy, more specifically the right to confidential lawyer-client communication (Article 8 ECHR) and the right to freedom of expression, which is particularly interesting with regard to the freedom of defence and commenting in the media (Article 10 ECHR).

In addition to the ECHR and ECtHR case law, the EU Charter on Human Rights (the EU Charter) and EU Directives, such as the EU Directive on access to a lawyer in criminal proceedings,[3] are included as well as relevant case law of the CJEU, since the importance of EU law in the field of criminal (procedural) law will only increase.[4] Since the entry into force of the Lisbon Treaty[5] on 1 December 2009, the EU Charter has the same binding force as the ECHR.[6] This means that Member States and EU institutions are obliged to guarantee the rights as stipulated in the EU Charter. These rights correspond to a large extent with the rights as stipulated in the ECHR. Sometimes the rights of the EU Charter are more detailed and more far-reaching than the rights of the ECHR[7] and some rights in the EU Charter are based upon ECtHR case law.[8] In that sense, the EU Charter could be considered as the

---

[1] ECtHR 16 October 2001, ECLI:CE:ECHR:2001:1016JUD003984698 (*Brennan/UK*),
§ 45; ECtHR 20 June 2002, ECLI:CE:ECHR:2002:0620JUD002771595 (*Berlinski/Poland*), § 75.
[2] ECtHR 16 October 2001, ECLI:CE:ECHR:2001:1016JUD003984698 (*Brennan/UK*),
§ 45; ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*), § 63.
[3] Directive of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 2013/48/EU, L 294/1. The other relevant directives are the Directive of 22 May 2012 on the right to information in criminal proceedings, 2012/13/EU, L 142/1 and the Directive of 20 October 2010 on the right to interpretation and translation in criminal proceedings, 2010/64/EU, L 280/1. All directives are part of the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings" (OJ C 295, 4 December 2009, p. 1) which is part of the Stockholm program as adopted by the European Council on 10 December 2009.
[4] Cape 2015, p. 48.
[5] Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007, C 306/1.
[6] Some Member States have excluded the application of the Charter: See Klip 2012, p. 60.
[7] Article 52 §3 EU Charter provides that when rights of the Charter correspond with the rights of the ECHR, the meaning and scope of these rights is the same and if applicable the rights as stipulated in the Charter may even provide a wider protection. The explanatory note on Art. 52 of the Charter provides lists of corresponding articles which have the same meaning and scope and which have a wider scope.
[8] Reneman 2010, p. 233-234.

modernised version of the ECHR.[9] Case law on fundamental procedural rights (Article 6 ECHR and Article 48 EU Charter) will now be developed not only by the ECtHR, but also by the CJEU. The added value of CJEU case law is that it can give rulings on for example the compatibility of national legislation with the EU Charter or EU Directives, while the ECtHR only has the jurisdiction to rule on specific individual complaints. National courts can also ask the CJEU for a prejudicial ruling, which can be helpful in explaining the scope and purport of national regulations on fundamental rights in criminal proceedings. It should be noted, however, that the caseload on criminal defence rights is much vaster at the ECtHR than at the CJEU, which makes the ECtHR case law - at least for now - a primary source of data.

In this Chapter 2 defence rights are approached from the perspective of the criminal defence lawyer.[10] This approach has some limitations. Firstly, not all defence rights as laid down in the ECHR are included in this normative framework. Not included are: the right to choose a lawyer (although it will be touched upon when discussing the right to legal aid and the disciplinary case law on appointed lawyers versus chosen lawyers), the right to be informed about procedural rights, the right to be informed about the accusation, the right to reasoned decisions and the right to appeal, the right to be presumed innocent and the privilege against self-incrimination. Of course, the lawyer has to be aware of these defence rights and he has to ensure that the accused person is informed properly about these rights and able to understand their meaning and scope. However, these rights do not raise particular deontological questions or issues for criminal defence lawyers. Hence, these defence rights are not included in the normative framework. Secondly, instead of offering any readymade answers to the possible ethical dilemmas and questions arising from looking at defence rights from a deontological perspective, those dilemma's and questions are identified to create a theoretical framework and to illustrate the practical impact of abstract regulations and case law on the daily legal practice of a criminal defence lawyer.

As has been explained in Chapter 1, the complexity of the criminal defence lawyer's position in criminal proceedings has been broken down in four roles: legal representative, strategic adviser, trusted counsellor and spokesperson. For each role different minimum safeguards are relevant, which is why these safeguards are discussed per role in the following paragraphs. Together they form the procedural element of the normative framework.

2.1 The Criminal Defence Lawyer as Legal Representative: The Right to Legal Assistance

Every accused person has the right to be tried before an impartial and independent tribunal in order to have a fair trial. As such criminal proceedings have to meet the requirements as

[9] Barkhuysen et al. 2011

[10] For comparative research on defence rights from the perspective of the accused, see for example Cape et al. 2007, Spronken et al. 2009, Cape et al. 2010, Cape et al. 2012, Blackstock et al. 2014.

provided in Article 6 ECHR and Articles 47 and 48 EU Charter in order to guarantee a fair trial. This means, for example, that when the accused person does not want or is not able to defend himself, he has the right to have a lawyer of his own choosing to assist him throughout proceedings. Legal assistance is an important prerequisite for a fair trial because without it, the accused person will have less chance of being informed of his defence rights properly and even less chance at having his rights respected.[11] In principle the accused person can choose his own defence counsel, unless the circumstances of the case call for (compulsory) appointment of defence counsel by the court.[12] If the accused person is not able to pay for legal representation himself and the interests of justice so require, defence counsel will be provided through legal aid.[13]

According to standing ECtHR case law, the accused does not have to prove that lack of legal assistance has prejudiced his position; the mere absence of access to effective legal assistance suffices to constitute a violation of Article 6 § 3 (c) ECHR:

> "Above all, there is nothing in Article 6 par. 3 (c) (art. 6-3-c) indicating that such proof is necessary; an interpretation that introduced this requirement into the sub-paragraph would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice."[14]

The Court recognises that the importance of the presence of a lawyer for the accused person lies not only in legal representation, but also in social and psychological support.[15] The way in which the right to legal assistance is exercised in a specific case, for example the choice of a lawyer, can be subject to certain restrictions, as long as these restrictions are strictly necessary and do not make access to legal assistance illusory.[16]

The analysis of the right to legal assistance in the following paragraphs concentrates on the right to have adequate time and facilities to properly prepare the defence (Article 6 § 3 (b) and § 3 (d) ECHR), which will be discussed in paragraph 2.2 and the right to self-representation, legal assistance specifically at the investigative phase and legal aid (Article 6

[11] ECtHR 24 September 2009, ECLI:CE:ECHR:2009:0924JUD000702504 (*Pishchalnikov/Russia*), § 78.
[12] ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), § 51; ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*), § 31; ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*), § 49; ECtHR (GC) 25 November 1997, ECLI:CE:ECHR:1997:1125JUD001895491 (*Zana/Turkey*), § 72; ECtHR (GC) 21 January 1991, ECLI:CE:ECHR:1999:0121JUD002610395 (*Van Geyseghem/Belgium*), § 33; ECtHR 22 September 1994, ECLI:CE:ECHR:1994:0922JUD001673790 (*Pelladoah/the Netherlands*), § 41. See also ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*).
[13] ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*), § 29; ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*), § 54.
[14] ECtHR 13 May 1980, ECLI:CE:ECHR:1980:0513JUD000669474 (*Artico/Italy*), § 35.
[15] ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*), § 32.
[16] Spronken 2001, p. 440.

§ 3 (c) ECHR; Article 47 and 48 § 2 EU Charter), which are discussed in this paragraph. These rights are interconnected,[17] which can be explained from the viewpoint that all rights protected by the ECHR should be practical and effective. Without proper preparation, including unsupervised and confidential lawyer-client communication[18] or the right to legal aid when an accused person has no sufficient means to pay for counsel, the right to self-representation and legal assistance can become illusory.[19] The right to self-representation, to legal assistance and to legal aid are provided for not only in the ECHR and EU Charter, but also in the EU Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Directive 2013/48).[20]

2.1.1 Relevant Regulations

In the majority of EU Member States suspects who are brought into the police station to be held in police custody are provided with a Letter of Rights,[21] explicating their most important procedural rights. Still, it cannot be denied that suspects are more likely to be able to fully understand and actually exercise those rights if they are assisted by a knowledgeable criminal defence lawyer who can explain those rights more elaborately. The right to access to a lawyer is thus considered a fundamental procedural right, which is embedded in the EU Charter, the ECHR and the Directive.

Article 6 § 3 ECHR reads:

> "3. *Everyone charged with a criminal offence has the following minimum rights:*
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> *(b) to have adequate time and facilities for the preparation of his defence;*

[17] See for example ECtHR 31 January 2002, ECLI:CE:ECHR:2002:0131JUD002443094 (*Lanz/Austria*), § 50-53; ECtHR (GC) 12 May 2005, ECLI:CE:ECHR:2005:0512JUD004622199 (*Öcalan/Turkey*).
[18] The right to confidential lawyer-client communication is discussed in paragraph 2.3 of this Chapter.
[19] ECtHR 25 April 1983, ECLI:CE:ECHR:1983:0425JUD000839878 (*Pakelli/Germany*).
[20] 2013/48/EU, L 294/1. This EU Directive was adopted on 22 October 2013.
[21] Spronken 2010, p. 39-40; Directive of the European Parliament and of the Council on the right to information in criminal proceedings, 22 May 2012, 2012/13/EU. The transposition date of this Directive was 2 June 2014, which means that all EU Member States should have implemented the Directive in their national legislation and provide a Letter of Rights to all suspects in criminal proceedings, Art. 3 and 4.

> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court." [emphasis added]

Article 47, second and third paragraph, EU Charter reads:

> "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. *Everyone shall have the possibility of being advised, defended and represented.* Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." [emphasis added]

Article 48 § 2 EU Charter reads:

> "Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

Article 3 of EU Directive 2013/48 is most elaborate on the right to access to a lawyer and reads:

> "1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned *to exercise their rights of defence practically and effectively*.
> 2. Suspects or accused persons *shall have access to a lawyer without undue delay*. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:
> (a) *before they are questioned* by the police or by another law enforcement or judicial authority;
> (b) *upon the carrying out* by investigating or other competent authorities *of an investigative or other evidence-gathering act* in accordance with point (c) of paragraph 3;
> (c) *without undue delay after deprivation of liberty*;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, *in due time before they appear before that court*.

3. The right of access to a lawyer shall entail the following:

(a) *Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them*, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) *Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned*. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. *Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.* Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a

> person; (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings." [emphasis added]

Recital 25 furthermore clarifies the circumstances in which legal assistance, in particular during police interrogation, is considered to be practical and effective:

> "Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, *provided that such procedures do not prejudice the effective exercise and essence of the right concerned*. *During questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law*." [emphasis added]

Following these provisions, the criminal defence lawyer's main task is to offer legal assistance to the accused person. Depending on the specific circumstances of the case, this can confront him with a number of deontological questions and issues. For example: what should the defence lawyer do if he is appointed by the court, but the accused wants to represent himself; should the lawyer always honour the accused's wishes or is he obliged to follow the court's instructions? And what if the accused cannot pay for the services of the defence lawyer himself and needs to rely on legal aid, resulting in a much lower remuneration; how should he balance his own financial interests with the interests of his client? What should the defence lawyer's advice be on the right to silence and pleading, when there is not enough information yet on the prosecution's case; simply waiting for the information might turn out to be detrimental to the accused, because usually the earlier the plea, the greater the sentence discount? And what is the defence lawyer's position if the accused chooses not to attend his own trial; can he then speak and conduct a defence on behalf of the accused? These are some deontological questions which might arise in the course of offering legal assistance to an accused person. In the following paragraphs the different aspects of the right to legal assistance and the deontological issues they present are discussed more thoroughly.

2.1.2 The Right to Self-Representation

An important aspect of the right to legal assistance is the right of the accused to waive this right. The accused has the right to represent himself. Two remarks should be made in this respect. First, this right is not absolute, thus the interests of justice might provide 'relevant and sufficient' reasons for mandatory legal representation.[22] Second, the court should not too readily assume that an accused has waived his right to legal assistance. According to the ECtHR in *Pishchalnikov* a waiver:

> "[…] must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right […] it must be shown that he could reasonably have foreseen what the consequences of his conduct would be."[23]

This right to waiver is regulated in Article 9 EU Directive 2013/48:

> "Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:
> (a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
> (b) the waiver is given voluntarily and unequivocally.
> 2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
> 3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed
> about that possibility. Such a revocation shall have effect from the moment it is made."

---

[22] See for example: ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*); ECtHR 15 November 2001, ECLI:CE:ECHR:2001:1115DEC004818899 (*Correia de Matos/Portugal*).

[23] ECtHR 24 September 2009, ECLI:CE:ECHR:2009:0924JUD000702504 (*Pishchalnikov/Russia*), § 76. See also for example ECtHR 27 March 2007, ECLI:CE:ECHR:2007:0327JUD003243296 (*Talat Tunç/Turkey*), § 59; ECtHR 31 March 2009, ECLI:CE:ECHR:2009:0331JUD002031002 (*Plonka/Poland*); ECtHR 1 April 2010, ECLI:CE:ECHR:2010:0401JUD004237102 (*Pavlenko/Russia*), § 102; ECtHR (GC) 1 March 2006, ECLI:CE:ECHR:2006:0301JUD005658100 (*Sejdovic/Italy*), § 86; ECtHR 18 February 2010, ECLI:CE:ECHR:2010:0218JUD003966002 (*Aleksandr Zaichenko/Russia*), § 40.

In *Zakshevskiy*[24] the ECtHR once more underlined the importance of the right to legal assistance, particularly during the pre-trial phase, and the fact that waiver of this fundamental right is only valid when it is done in an unequivocal manner. Zakshevskiy was arrested and questioned in relation to allegations concerning an armed robbery. Although he was informed of his right to legal assistance before questioning, he signed a waiver and consequently was questioned in the absence of a lawyer. During these interrogations relating to the robbery, Zakshevskiy not only made incriminating statements relating to the robbery, but also made statements concerning a number of other offences, including aggravated murder. Consequently, Zakshevskiy was questioned further about his involvement regarding the murder, again without the presence of a lawyer, but it was not clear from the file whether Zakshevskiy was ever offered the opportunity to have a lawyer present during the interviews concerning the murder charges nor was there evidence in the file of any waiver of the right to legal assistance for these interviews. Zakshevskiy made detailed statements concerning the robbery as well as the aggravated murder, which were later used in evidence leading to his conviction on both charges. It is important to note that according to domestic legislation regarding the murder charges, authorities are required to offer legal assistance. Additionally, during trial Zakshevskiy retracted all self-incriminating statements made pre-trial and consistently claimed he was innocent. Nonetheless, his statements made pre-trial played an important part in his conviction. The ECtHR considered that it was Zakshevskiy's own choice not to be represented by a lawyer during interrogation regarding the robbery. The statements made during these interrogations as far as they were related to the robbery could therefore readily be used in evidence. Regarding the statements made in the context of the murder charges, the Court took into consideration that under domestic law Zakshevskiy should have been offered legal assistance; moreover, it followed from the case file that he had never waived his right to legal assistance when questioned about the murder charges. As such, the national courts should not have relied on these statements made in absence of a lawyer. Regarding his conviction for the murder charges, Zakshevskiy's right to legal assistance (Article 6 § 3 (c) ECHR) was violated according to the ECtHR.[25] The right to waiver thus underlines the significance of the right to defend oneself as stipulated in Article 6 § 3 (c) ECHR, but ECtHR case law also explicitly attaches strict criteria to this waiver in order to prevent the right to legal assistance from becoming illusory and merely theoretical.[26]

At the same time the right to defend oneself in person is not absolute. Compulsory appointment of defence counsel does not constitute a breach of Article 6 § 3 (c) ECHR when

[24] ECtHR 17 March 2016, ECLI:CE:ECHR:2016:0317JUD000719304 (*Zakshevskiy/Ukraine*).
[25] ECtHR 17 March 2016, ECLI:CE:ECHR:2016:0317JUD000719304 (*Zakshevskiy/Ukraine*), § 111-121.
[26] ECtHR 17 March 2016, ECLI:CE:ECHR:2016:0317JUD000719304 (*Zakshevskiy/Ukraine*), § 112 (including references).

it is done under strict conditions and only if it serves the best interests of the defence.[27] Compulsory appointment of defence counsel for reasons of fairness of proceedings and to advance efficiency and expeditiousness of criminal proceedings might be reasonable. However, from a deontological stance it raises several questions. Imagine the situation that a defence lawyer has been appointed to represent an accused person, irrespective of the fact that this person has just waived his right to legal assistance (for example in case of mandatory legal representation for murder charges as discussed *Zakshevskiy*). What should the defence lawyer in such circumstances do? Should he honour the accused's waiver of his right to legal assistance and therewith defy his appointment by the authorities? And if he accepts the appointment, how will he remain professionally independent or at least avoid the appearance of dependency from the authorities? Another issue is whether and to what extent compulsory appointment affects building a confidential relationship with the client. And if the accused has the right to represent himself, does that automatically mean that he is also in charge of the defence? Or would it be more obvious that the lawyer, who has the necessary legal knowledge and practical skills, is in charge of the defence? Or could there be a middle ground, where both the lawyer and the accused are in charge of the defence? Answers to these questions are not easily formulated, because they very much dependent on the specific circumstances of the case. However, guidance is offered by rules of conduct for (criminal defence) lawyers. Relevant regulations in this regard will be mapped out in Chapter 3.

2.1.3 Legal Assistance in the Investigative Phase, particularly regarding Police Interrogation

The first stage of criminal proceedings, the investigative phase, especially before and during police interrogation, is crucial for the accused person. At this early stage the accused has to take important decisions regarding his defence strategy, such as whether to remain silent during interrogation or call certain witnesses. Decisions which can have repercussions for the rest of the proceedings.[28] At the same time the accused finds himself in a vulnerable position: he has just been arrested and put in police custody, confronted with interrogations and an environment he might be unfamiliar with. The ECtHR recognised this particularly vulnerable position of the accused in the investigative stage, by considering that

[27] ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*), § 27; ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*), § 50; ECtHR 15 November 2001, ECLI:CE:ECHR:2001:1115DEC004818899 (*Correia de Matos/Portugal*).
[28] Cape et al. 2007, p. 8-11; ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), § 54; Blackstock et al. 2014, p. 4.

> "[…] national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings" [29]

so that

> "[…] this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. […] Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination." [30]

The right to legal assistance as stipulated in Article 6 § 3 (c) ECHR applies to all stages of proceedings, also the investigative stage.[31] Although the right to legal assistance in itself is absolute, it is left to the Member States how to secure this right in their legal systems. This margin of appreciation allows for certain restrictions in the implementation of the right to legal assistance; in each individual case the ECtHR will assess whether these restrictions do not infringe the right to a fair trial taking into consideration the specific circumstances of the case and in light of the proceedings as a whole.[32] Until its *Salduz* judgment the ECtHR considered it a fundamental right of the accused person to have access to legal assistance in the investigative phase to the extent that this was deemed necessary in light of the important decisions that the accused had to make regarding his defence strategy.[33] The Court, however, explicitly ruled that Article 6 § 3 (c) ECHR did not necessarily entail the right to have a lawyer present *during* police interrogation,[34] although it did recognise the importance of the presence of a lawyer in protecting the accused from incriminating himself.[35] In its *Salduz* judgment the ECtHR left this traditional line of reasoning:

---

[29] ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), § 52.
[30] ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), § 54; see also ECtHR 24 November 1993, ECLI:CE:ECHR:1993:1124JUD001397288 (*Imbrioscia/Switzerland*), § 36.
[31] See for example: ECtHR 24 November 1993, ECLI:CE:ECHR:1993:1124JUD001397288 (*Imbrioscia/Switzerland*), § 36; ECtHR 16 October 2001, ECLI:CE:ECHR:2001:1016JUD003984698 (*Brennan/UK*); Spronken 2001, p. 441.
[32] See for example: ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*); ECtHR 16 October 2001, ECLI:CE:ECHR:2001:1016JUD003984698 (*Brennan/UK*). See also Spronken 2001, p. 440; Spronken 2009, p. 95-96.
[33] See for example: ECtHR 6 June 2000, ECLI:CE:ECHR:2000:0606JUD003640897 (*Averill/UK*).
[34] ECtHR 14 December 1999, ECLI:CE:ECHR:1999:1214DEC004473898 (*Dougan/UK*).
[35] ECtHR 2 May 2000, ECLI:CE:ECHR:2000:0502JUD003571897 (*Condron/UK*).

> "[…] in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 requires that, *as a rule*, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – *whatever its justification* – must not unduly prejudice the rights of the accused under Article 6. *The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction*." [emphasis added][36]

As such the ECtHR introduced its "*Salduz* standard", which subsequently has been developed in a massive body of case law:[37] if an accused has been denied access to a defence lawyer during the investigative phase, particularly from the first interrogation and the accused has made incriminating statements during this interrogation and those statements were used in evidence, then the only possible response to this flagrant violation of Article 6 ECHR is to exclude these statements from evidence, unless there has been a "compelling reason" to restrict the right to legal assistance[38] or if the accused has explicitly, voluntarily and unequivocally waived this right.[39] Yet, despite the presence of 'compelling reasons' to restrict access to legal advice, statements made during interrogation in the absence of a defence lawyer should still be excluded from evidence if the admission of such statements would cause undue prejudice to the applicant in criminal proceedings.[40]

---

[36] ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), § 55.

[37] For a selection of noteworthy *Salduz* case law see the ECtHR Factsheet (September 2019) on Police arrest and assistance of a lawyer (https://www.echr.coe.int/Documents/FS_Police_arrest_ENG.pdf).

[38] See for example ECtHR 16 December 2014, ECLI:CE:ECHR:2014:1216JUD005054108 (*Ibrahim and others/UK*): "[…] exceptionally serious and imminent threat to public safety and that this threat provided compelling reasons which justified the temporary delay of all four applicants' access to lawyers" (§ 203).

[39] See for example ECtHR 17 March 2016, ECLI:CE:ECHR:2016:0317JUD000719304 (*Zakshevskiy/Ukraine*), § 111-123.

[40] ECtHR 16 December 2014, ECLI:CE:ECHR:2014:1216JUD005054108 (*Ibrahim and others/UK*), §§ 195-196 (referral to Grand Chamber). In *Blokhin v. Russia* (ECtHR (GC) 23 March 2016, ECLI:CE:ECHR:2016:0323JUD004715206) the Grand Chamber ruled that the protection offered by the *Salduz* standard is also applicable in proceedings that do not result in criminal prosecution. At the time of his arrest Blokhin was 12 years old and according to Russian law persons are only criminally liable at the age of 14, so that he could not be prosecuted. After his arrest, Blokhin was questioned without the presence of a lawyer or an appropriate adult and made several incriminating statements. The Grand Chamber ruled that, even though no criminal prosecution was initiated, Blokhin should have been granted access to legal representation during the interviews and found that Article 6 § 3 (c) ECHR had been violated.

From the extensive list of post-*Salduz* ECtHR judgments[41] it becomes clear that the *Salduz* standard can be divided into a rigid and restrictive core and into softer principles that are open to relativism. The rigid core consists of the *Salduz* standard as cited above, particularly when domestic law and practice categorically exclude access to legal assistance in the pre-trial stage.[42] There are, however also softer principles relating to the right to legal assistance, such as access to a defence lawyer during investigative measures other than interrogation, the obtainment of 'real evidence' as opposed to statements, access to a defence lawyer for accused persons who are not arrested and access to a defence lawyer of one's own choosing.

In *Dvorski*[43] the ECtHR addressed the accused person's right to be assisted by a defence lawyer of his choice as opposed to having one appointed. This case is noteworthy because the Court contrasted the situation in which the accused had not had any legal assistance during interrogation (*Salduz*) against the situation in which the accused was denied access to his *chosen* defence lawyer, but was represented by a duty lawyer during interrogation (*Dvorski*). Freedom to choose one's lawyer is fundamental to the confidential lawyer-client relationship, which is at the heart of effective criminal defence.[44] The Court once again explained the different tests that have to be applied to these situations. In *Salduz* only 'compelling reasons' would allow restrictions to the right to legal assistance. Yet, the ECtHR found the situation in Dvorski's case less serious since he had had legal assistance during interrogation. The issue in this case was that he had been denied access to the defence lawyer of his choice. In such a situation 'relevant and sufficient' (as opposed to 'compelling') reasons would suffice to justify the denial of access to the chosen lawyer.[45] For example, if the chosen defence lawyer is not a licensed advocate or otherwise considered unqualified to be able to offer effective legal representation to the accused person, choice can be limited.[46] If there are no such reasons, the Court continues to evaluate the overall fairness of the proceedings. In doing so, the Court may take into account various factors, such as the effectiveness of the legal assistance, the use of any statements in evidence and whether the

[41] A quick search on HUDOC, using 'Salduz' as a keyword produced 636 results (search performed on 6 October 2019).

[42] See for example ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*), § 33; ECtHR 9 April 2015, ECLI:CE:ECHR:2015:0409JUD003046013 (*A.T./Luxembourg*), § 62; ECtHR 12 January 2016, ECLI:CE:ECHR:2016:0112JUD003753713 (*Borg/Malta*), § 111.

[43] ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*).

[44] See also for example: Smith 2013.

[45] See also ECtHR (GC) 26 July 2002, ECLI:CE:ECHR:2002:0726JUD003291196 (*Meftah and Others/France*), § 45; ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*), § 29.

[46] See for example ECtHR 24 November 2011, ECLI:CE:ECHR:2011:1124JUD002700406 (*Zagorodniy/Ukraine*), § 53. See also ECtHR 19 February 2009, ECLI:CE:ECHR:2009:0219JUD001640403 (*Shabelnik/Ukraine*), § 39; ECtHR 20 January 2005, ECLI:CE:ECHR:2005:0120JUD006337800 (*Mayzit/Russia*), § 68.

accused is held in custody.[47] In applying this more lenient test, the Court in *Dvorski* considered whether Dvorski was represented by a defence lawyer on the basis of his own informed choice; whether there were relevant and sufficient reasons to restrict Dvorski having access to his chosen lawyer; whether he had waived his right to be assisted by his chosen defence lawyer and whether the fairness of the proceedings as a whole were prejudiced.[48] Circumstances that were decisive in *Dvorski* concerned that Dvorski had not been informed properly by the police about the fact that his chosen lawyer had contacted the police; that this lawyer had even attended the police station prior to the start of the interrogation; that the Government could not provide any sufficient or relevant reasons for the restriction of Dvorski's right to be presented by a lawyer of his own choice; that Dvorski had not waived this right, since he had no knowledge of his chosen lawyer's presence at the police station. Moreover, the Court took into account that the duty lawyer had only arrived at the police station very shortly before the interrogation started, leaving only very little time for consultation with Dvorski, therewith calling into question the effectiveness of the legal assistance provided by the duty lawyer. This is all the more relevant, because Dvorski's chosen lawyer was already present at the police station long before the duty lawyer arrived. Before the national courts, Dvorski alleged that the denial of access to his chosen lawyer had led him to making incriminating statements during police interrogation. The courts, however, did not investigate these allegations any further. Under these circumstances, the ECtHR ruled that the national courts: "failed to take adequate remedial measures to ensure fairness".[49] Taking into account the fact that the incriminating statements were used in evidence (irrespective of the fact that those statements were not decisive in Dvorski's conviction) and the fact that the chosen lawyer was at the disposal of the police at the initial stages of the proceedings, particularly prior to and during police interrogation, the Court found that there had been a violation of Article 6 § 3 (c) ECHR.

In *Dvorski* the ECtHR briefly touched upon the effectiveness of legal assistance, by considering that the short time period in which Dvorski had been able to consult the duty lawyer prior to the interrogation, if he had been able to consult this lawyer at all, did not amount to an effective exercise of the right to legal assistance.[50] It follows from the core principle of professional independence that the manner in which a defence is conducted is essentially a matter between the accused and his counsel.[51] Consequently, only few cases

[47] ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*), § 82.
[48] ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*), § 83-111.
[49] ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*), § 112.
[50] ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*), § 106. Similarly: ECtHR 9 April 2015, ECLI:CE:ECHR:2015:0409JUD003046013 (*A.T./Luxembourg*), § 90 and also ECtHR 2 November 2010, ECLI:CE:ECHR:2010:1102JUD002127203 (*Sakhnovskiy/Russia*), §§ 97-98 on the right to effectively and confidentially communicate with one's lawyer.
[51] ECtHR 21 April 1998, ECLI:CE:ECHR:1998:0421JUD002260093 (*Daud/Portugal*), § 38. States are only required to intervene if a failure by legal aid counsel to provide effective representation is manifest or

explicitly refer to the effectiveness of the criminal defence lawyer's performance when representing an accused person in criminal proceedings. In this regard *Dayanan*[52] is relevant. In this case the Court emphasised that the fairness of proceedings require that

> "[…] an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that persons defence: discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."[53]

This case is noteworthy, since the Court unanimously found a violation of the right to legal assistance, notwithstanding the fact that Dayanan remained silent when questioned in police custody. Systemic restriction of the right to access to legal assistance was sufficient in itself to find a violation of Article 6 ECHR,[54] apparently rendering the fact that the interviews did not deliver any evidence against Dayanan less significant. It is also noteworthy, because the Court explicitly clarified what an effective defence at least should entail: not only unimpeded access to his lawyer[55] to discuss the case, organise and prepare the defence, but also to receive (moral, practical and social) support from the defence lawyer and to have the detention conditions checked.

In another case, *Gabrielyan,*[56] the Court emphasised that not only the lawyer and the authorities but also the client have a shared responsibility in the effectuation of proper legal representation. Gabrielyan was arrested on 8 April 2004 for handing out leaflets and calling for a demonstration to overthrow the current Armenian Government. A day after his arrest a legal aid lawyer H.I. was appointed to represent Gabrielyan. The latter agrees with this appointment and H.I. attended further interrogations, during which Gabrielyan consistently denied all allegations. H.I. also attended several confrontations between Gabrielyan and witnesses. Throughout all the investigations H.I. had never met or consulted Gabrielyan privately to provide legal advice nor did he respond to Gabrielyan's request for a copy of the Code of Criminal Procedure. During appeal proceedings Gabrielyan filed a motion with the Court of Appeal in which he explained why he no longer wished to be represented by his

sufficiently brought to their attention in some other way (ECtHR 19 December 1989, ECLI:CE:ECHR:1989:1219JUD000978382 (*Kamasinski/Austria*), § 65).

[52] ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*).

[53] ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*), § 32.

[54] ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*), § 33.

[55] See also: ECtHR 21 April 2011, ECLI:CE:ECHR:2011:0421JUD004231004 (*Nechiporuk and Yonkalo/Ukraine*), § 266.

[56] ECtHR 10 April 2012, ECLI:CE:ECHR:2012:0410JUD000808805 (*Gabrielyan/Armenia*).

lawyer. This motion was primarily based on the fact that H.I. had filed a motion for Gabrielyan's release from detention by stating that Gabrielyan pleaded guilty to the alleged offences.[57] The Court of Appeal granted this motion and H.I. was requested to leave the courtroom so that Gabrielyan could defend himself in person. Gabrielyan also filed a complaint with the Armenian Bar Association, which ruled that H.I. had lawfully carried out the applicant's defence, denying Gabrielyan's complaint. Before the ECtHR Gabrielyan complained that H.I., his State-appointed lawyer, did not provide effective legal assistance because he failed to ever meet him in private and did not provide assistance in cross-examining witnesses.

The Court emphasised that merely nominating a lawyer does not in itself ensure effective assistance and therefore does not render the right to legal assistance practical and effective. The authorities were obliged to react when they were notified of a situation of ineffective legal assistance.[58] The Court continued to evaluate the present case and noted that although H.I. had been present during all subsequent investigative measures involving the applicant, his conduct showed

> "[…] absolute passivity. He does not appear to have had any involvement whatsoever in the applicant's interviews other than signing the relevant records and failed to pose any questions to the witnesses against the applicant during the confrontations. Further, nothing suggests that the lawyer ever met with the applicant to discuss his case and to provide legal advice. The Court lastly cannot ignore the lawyer's final speech made before the District Court which was devoid of any factual or legal arguments, as well as the fact that the lawyer appears not to have had any involvement in the drafting of the applicant's appeal against the judgment of the District Court."[59]

However, according to the Court, Gabrielyan was equally responsible for notifying the authorities of any misconduct on the part of his lawyer.

> "In any event, even assuming that the entirety of the applicant's allegations are true, it was still incumbent on him to bring the lawyer's failures to the attention of the authorities, who cannot be blamed for such failures if they were not informed of them in a timely and proper manner."[60]

[57] ECtHR 10 April 2012, ECLI:CE:ECHR:2012:0410JUD000808805 (*Gabrielyan/Armenia*), § 49.
[58] ECtHR 10 April 2012, ECLI:CE:ECHR:2012:0410JUD000808805 (*Gabrielyan/Armenia*), § 65.
[59] ECtHR 10 April 2012, ECLI:CE:ECHR:2012:0410JUD000808805 (*Gabrielyan/Armenia*), § 66.
[60] ECtHR 10 April 2012, ECLI:CE:ECHR:2012:0410JUD000808805 (*Gabrielyan/Armenia*), § 67.

It was not until the final hearing before the Court of Appeal that the applicant showed signs of dissatisfaction with his lawyer. According to the Court, he should have made himself heard long before that moment. Even more so, Gabrielyan had given his explicit consent to be represented by H.I. throughout the entire investigation and proceedings and his complaint about his lawyer's conduct concerned only the fact that his lawyer had filed a motion based on a guilty plea which Gabrielyan claimed he never submitted. In conclusion, the Court considered that the lawyer's conduct was not all bad. Indeed, he did file a motion seeking the applicant's release from detention, put some meaningful questions to witnesses during the proceedings, and had insisted before the Court of Appeal on taking measures to ensure attendance of certain witnesses. Consequently, the Court decided that

> "[…] there are not sufficient elements in the present case to conclude that the State-appointed lawyer manifestly failed to provide effective legal assistance or, even assuming that he did, that the authorities can be held liable for that failure in the particular circumstances of the case."[61]

This case is noteworthy, since the Court rarely makes any statements regarding the quality of a lawyer's conduct. Although the Court's observations still remain rather at the surface in this judgment, the Court does explain that a lawyer's absolute passivity during most parts of the investigation and court proceedings does not contribute to an effective legal representation. However, it is not the individual lawyer who has to give account for his actions before the court, it is the State, in this case Armenia, who was party to these proceedings. In that regard, the Court did not even have to make any statements regarding the lawyer's conduct. Yet, it did this by highlighting some of the significant procedural measures the lawyer did take. The main issue here seems to be the applicant's failure in bringing his lawyer's shortcomings to the attention of the authorities. Indeed, authorities can only be held accountable if they are properly informed of a State-appointed lawyer's failure to provide effective legal assistance. Therefore, the Court held unanimously that Article 6 § 3 (c) ECHR had not been violated in this case.

In *Aras*[62] the Court also considered the conditions under which legal assistance is effective, even though, this case did not specifically concern legal assistance prior to or during police interrogation. Aras had categorically been denied access to legal assistance during police interrogation. Only at the hearing before the investigating judge, was his lawyer present during questioning, but he was not allowed to consult with Aras, nor to make any

[61] ECtHR 10 April 2012, ECLI:CE:ECHR:2012:0410JUD000808805 (*Gabrielyan/Armenia*), § 69.
[62] ECtHR 18 November 2014, ECLI:CE:ECHR:2014:1118JUD001506507 (*Aras/Turkey (no. 2)*).

comments.[63] The Court referred to its *Salduz* standard and considered that in the present case,

> "[…] the applicant's lawyer was allowed to enter the hearing room during the questioning of the applicant, however, this was a passive presence without any possibility at all to intervene to ensure respect for the applicant's rights. Furthermore, the restriction imposed concerning access to a lawyer was systematic […] and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts. Accordingly, the Court concludes that the mere presence of the applicant's lawyer in the hearing room cannot be considered to have been sufficient by Convention standards"[64]

As such, similar to *Gabrielyan,* the Court ruled that the mere presence of a lawyer during questioning did not constitute an effective exercise of the right to legal assistance and therefore was inadequate to compensate for the absence of legal assistance earlier in proceedings. In contrast to *Gabrielyan,* however, the authorities in *Aras* could be held accountable for the fact that Aras categorically had been denied access to legal assistance during police interrogation according to domestic law. This difference caused the Court in *Aras* to hold that Article 6 § 3 (c) ECHR had been violated.

2.1.3.1 Abandoning the 'Bright Line' Rule and Introducing a New Standard

In sum, standing ECtHR case law shows that Article 6 § 3 (c) ECHR also applies to the investigative phase to the extent that the right to legal assistance prior to and during police interrogation has been established for all accused persons. Incriminating statements made by the accused person in the absence of legal assistance, without there being compelling reasons to restrict the accused person's right of access to legal assistance, should be excluded from evidence to remedy the fact that such denial of access to legal assistance violates Article 6 § 3 (c) ECHR. This reasoning is also referred to as the "bright line" rule. Then, on 13 September 2016 the ECtHR Grand Chamber rendered its judgment in *Ibrahim and others v. UK*.[65] This case deserves close attention against the background of the development of *Salduz* case law as described above, since the aforementioned "bright line" rule was effectively abandoned by the ECtHR in its *Ibrahim and others* judgment. The case of Ibrahim and three other applicants involved serious allegations of terrorist attacks on London public transport in 2005. In all cases the applicants complained that their right to legal assistance

[63] ECtHR 18 November 2014, ECLI:CE:ECHR:2014:1118JUD001506507 (*Aras/Turkey (no. 2)*), § 39.
[64] ECtHR 18 November 2014, ECLI:CE:ECHR:2014:1118JUD001506507 (*Aras/Turkey (no. 2)*), § 40.
[65] ECtHR (GC) 13 September 2016, ECLI:CE:ECHR:2016:0913JUD005054108 (*Ibrahim and others/UK*).

had been violated during the investigative stage of proceedings. Three of the applicants, including Ibrahim, were subjected to urgent 'safety interviews', meaning that they were cautioned, but no lawyers were allowed to be present during these interviews. According to domestic law, safety interviews may only be ordered when there is an urgent need to not delay the interviews because there are serious reasons to believe that delay would cause immediate risk of harm to persons or serious loss or damage to property.[66] Statements made during these safety interviews were used in evidence against them. Although the fourth applicant was initially interviewed as a witness, during these interviews, it emerged that he had also been involved in the attacks. At the moment during the interview when he became a suspect, he should have been cautioned and offered legal assistance. This was, however, not done and the fourth applicant made several incriminating statements during the interviews, which were later used in evidence against him.

In the general principles the ECtHR reiterated its test as set out in *Salduz*, which according to the ECtHR consists of two stages:

> "In the first stage the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair. This test has been cited and applied on numerous occasions by the Court. *However, the Court considers that the application of the Salduz test in its subsequent case-law discloses a need to clarify each of its two stages and the relationship between them*. [emphasis added]" (§ 257)

In *Ibrahim and others* the ECtHR decided to reassess the *Salduz* test. First, the Court developed a new test to determine what constitutes 'compelling reasons' by considering that the decision to restrict legal advice has to have a clearly defined basis in domestic law, meaning that the "content of any restrictions on legal advice has to be sufficiently circumscribed by law".[67] Additionally, the compelling nature of reasons advanced by the Government has to be assessed based on the particular circumstances of each case. According to the Court, such circumstances *can* exist when the Government has "convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity."[68] For this new test the Court relied on EU

[66] Terrorism Act 2000, Schedule 8 § 6 – 8.
[67] ECtHR (GC) 13 September 2016, ECLI:CE:ECHR:2016:0913JUD005054108 (*Ibrahim and others/UK*), § 258.
[68] ECtHR (GC) 13 September 2016, ECLI:CE:ECHR:2016:0913JUD005054108 (*Ibrahim and others/UK*), § 259.

Directive 2013/48,[69] which allows for a temporary derogation from the right to legal advice,[70] and on *New York v. Quarles* 467 U.S. 649 (1984).

The dissenting judges in *Ibrahim and others* argued that the new test for determining the compelling nature of reasons to temporarily delay access to legal advice is flawed. According to the dissenting judges, the reference to "the American approach was misplaced and demonstrated the shortcoming in the Court's standard".[71] *New York v. Quarles* concerned a case in which the presence of a firearm presented an imminent threat to the arresting police officers who started questioning the suspect without cautioning him first, only to find out the whereabouts of the weapon as soon as possible. Clearly, this case demonstrated that the "public safety exception" particularly applies when it concerns a serious and *imminent* threat. The mere existence of an urgent need to avert adverse consequences to public safety is, however, insufficient. Or as the dissenting judges put it:

> "The fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives."[72]

According to the dissenting judges, the test regarding 'compelling reasons' as provided by the Court should be complemented with an element of imminence, which would in itself also clearly delimit the temporary character of a derogation. EU Directive 2013/48 also refers to the possibility of derogation only in "cases of urgency" and any abuse of this derogation "would in principle irretrievably prejudice the rights of the defence".[73] This is what constitutes the "bright line" rule, which was abandoned by the Grand Chamber in its *Ibrahim and others* judgment by determining that the impact of the derogation on the fairness of proceedings always has to be assessed (the second stage of the revised *Salduz* test). This assessment is either holistic (when there are compelling reasons present) or very specific (when there are no compelling reasons). In the latter case, the fact that the Government failed to demonstrate that there were in fact compelling reasons to restrict the accused's

[69] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

[70] Directive 2013/48/EU, s. 6(a): "In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person."

[71] Joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque, § 20.

[72] Joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque, § 21.

[73] Directive 2013/48/EU, recital 31.

access to legal assistance will weigh heavily when assessing the overall fairness of proceedings. Other factors that are taken into account include the vulnerability of the accused, whether material obtained under the restrictions is used in evidence, whether the circumstances in which the evidence was obtained raise doubts about its accuracy or reliability and whether the assessment of guilt was performed by professional judges or jurors.[74] In *Ibrahim and others* the Grand Chamber established, regarding the first three applicants, that the Government had convincingly demonstrated that compelling reasons existed for the restriction of the applicants' right to legal assistance and that the proceedings, despite the delays in providing legal assistance, had been fair. The situation of the fourth applicant, however, was different. The fact that he was initially questioned as a witness and not cautioned as soon as the authorities regarded him as a suspect, caused the Grand Chamber to conclude that the Government, in the fourth applicant's case, had not convincingly demonstrated that there were compelling reasons to restrict the applicant's access to legal advice. Moreover, the Government, according to the ECtHR, failed to demonstrate why proceedings as a whole were still fair, despite the fact that the applicant was not cautioned and his right to legal assistance restricted. The Grand Chamber therefore held that with regard to the fourth applicant Article 6 § 3 (c) ECHR had been violated.

This reassessed *Salduz* test as developed by the ECtHR in its *Ibrahim and others* judgment has been applied, further evaluated and explained by the Grand Chamber in *Simeonovi v. Bulgaria*[75] and *Beuze v. Belgium*.[76] Simeonovi had not had legal assistance during a significant part of pre-trial proceedings. Since national legislation did not limit the right to legal assistance, the ECtHR first needed to determine whether the fact that Simeonovi had lacked legal assistance was the consequence of him waiving this right or whether this was due to an illegitimate denial by the authorities of his request to contact his lawyer pre-trial. Unfortunately, the case file did not show records of the first days of pre-trial custody, so that it was impossible to determine whether Simeonovi had made any requests to be assisted by a lawyer at that time. The case file furthermore did not contain any written confirmation that Simeonovi had been properly informed of his right to legal assistance nor was the Government able to provide other evidence which would support the Government's allegation that Simeonovi had been provided with information on his defence rights at the moment of his arrest.

[74] ECtHR (GC) 13 September 2016, ECLI:CE:ECHR:2016:0913JUD005054108 (*Ibrahim and others/UK*), §§ 264-265 and 274; ECtHR 10 November 2016, ECLI:CE:ECHR:2016:1110JUD004801606 (*Sitnevskiy and Chaykovskiy/Ukraine*), § 62; ECtHR 8 March 2018, ECLI:CE:ECHR:2018:0308JUD003477909 (*Dimitar Mitev/Bulgaria*), § 71-72.
[75] ECtHR (GC) 12 May 2017, ECLI:CE:ECHR:2017:0512JUD002198004 (*Simeonovi/Bulgaria*).
[76] ECtHR (GC) 9 November 2018, ECLI:CE:ECHR:2018:1109JUD007140910 (*Beuze/Belgium*).

> "Accordingly, even supposing that the applicant did not expressly request the assistance of a lawyer while in police custody, as provided in Bulgarian law at the material time, he cannot be deemed to have implicitly waived his right to legal assistance, since he had not promptly received such information after his arrest. His right to legal assistance was therefore restricted." [77]

Furthermore, the Government in *Simeonovi* failed to mention any exceptional circumstances in which compelling reasons would be permitted, so that the Court assumed that there were no compelling reasons. Consequently, a very strict scrutiny of the fairness of proceedings needed to be conducted by the Court to determine whether Simeonovi's right to legal assistance had been irretrievably prejudiced. Firstly, Simeonovi had not given any statements, nor was he involved in any other investigative measures during the period in which he did not have legal assistance. Secondly, at a later stage in the proceedings, Simeonovi voluntarily confessed in the presence of a lawyer. Thirdly, he actively participated in all stages of the proceedings. Fourthly, his conviction was based not only on his confession, but also on a significant amount of evidence which originated from different sources. [78] Based on these findings, the Grand Chamber of the ECtHR held that Article 6 § 3 (c) ECHR had not been violated. This decision was, however, not unanimous. According to the dissenting judges, the reassessed *Salduz* test required that a greater effort should have been demanded from the Bulgarian Government to discharge its burden to prove that the overall fairness of proceedings was maintained and in particular to prove that no coercion or compulsion was exerted upon Simeonovi during the period in which he did not have legal assistance. Moreover, the dissenting judges could not agree with the majority's conclusion that Simeonovi's right to a fair trial was not prejudiced due to the fact that the evidence on which his conviction was based was not the result of his lack of legal assistance pre-trial. In their opinion, this interpretation of the requirements following *Ibrahim and others* was too one-sided since *Ibrahim and others* required the Court to "[…] take into account the cumulative effect of the procedural shortcomings when assessing whether or not the Government have proved that the overall fairness of the trial was not irretrievably prejudiced". [79] Lastly, the dissenting judges feared that the decision of the majority could have undesirable negative side effects, since their decision implied that the Court legitimates a violation of the detained person's right to access to a lawyer upon arrest, as long as this person is not questioned during that period. Presumably, judicial authorities and the police would be less inclined to

[77] ECtHR (GC) 12 May 2017, ECLI:CE:ECHR:2017:0512JUD002198004 (*Simeonovi/Bulgaria*), § 128.
[78] ECtHR (GC) 12 May 2017, ECLI:CE:ECHR:2017:0512JUD002198004 (*Simeonovi/Bulgaria*), § 136-142.
[79] ECtHR (GC) 12 May 2017, ECLI:CE:ECHR:2017:0512JUD002198004 (*Simeonovi/Bulgaria*), partly dissenting opinion of Judges Sajó, Lazarova-Trajkovska and Vucinic joined by Judge Turkovic.

ensure that the rights of the defence, in particular the right to legal assistance, can be exercised effectively in the pre-trial phase.

In *Beuze v. Belgium* the Grand Chamber of the ECtHR reiterated that notwithstanding the fact that the applicant's arrest and interrogation by the police had taken place before the delivery of the ruling in *Salduz*, the applicant still was entitled to the protection of Article 6 ECHR and therefore entitled to the assistance of a lawyer while in police custody. This is important, because at the material time, Belgian legislation did not provide any right to access to a lawyer pre-trial, so that Beuze was deprived of legal assistance throughout the entire pre-trial proceedings. During that period, Beuze was interviewed several times by the police, always without a lawyer being present. The Grand Chamber furthermore explained:

> "The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons."[80]

Similar to the Bulgarian Government in *Simeonovi*, the Belgian Government in *Beuze* failed to demonstrate the existence of exceptional circumstances justifying the restrictions of Beuze's right to access to a lawyer at the pre-trial stage. In *Beuze* the circumstances, however, were different. Beuze was interviewed several times while he was held in police custody. During those interviews Beuze never confessed, although he gave detailed statements which influenced the line of investigation. Moreover, Beuze changed his statements several times, which undermined and affected his position. All of Beuze's statements were consequently admitted in evidence and the jury, which had to decide on Beuze's guilt, was not properly instructed by the judge regarding the circumstances in which Beuze had given these statements. Even more so, the jury's verdict showed that the statements made by Beuze without a lawyer being present were an integral part of the evidence. Taking all these circumstances into account, the ECtHR concluded that Beuze had not been able to fully exercise his defence rights, in particular the right to legal assistance, the right to silence and the right not to incriminate himself. Consequently the Grand Chamber unanimously held that the proceedings as a whole were unfair and therefore that Article 6 ECHR had been violated.

To illustrate the recent application of *Ibrahim and others*, the rulings of the ECtHR in *Van de Kolk*[81] and *Mehmet Ali Eser*[82] are briefly discussed here.[83] In *Van de Kolk* as well as

[80] ECtHR (GC) 9 November 2018, ECLI:CE:ECHR:2018:1109JUD007140910 (*Beuze/Belgium*), § 142.
[81] ECtHR 28 May 2019, ECLI:CE:ECHR:2019:0528JUD002319215 (*Kolk/the Netherlands*).
[82] ECtHR 15 October 2019, ECLI:CE:ECHR:2019:1015JUD000139907 (Mehmet Ali Eser/Turkey).
[83] See also ECtHR 11 July 2019, ECLI:CE:ECHR:2019:0711JUD003082813 (*Bloise/France*) and

Mehmet Ali Eser the right to access to a lawyer during the pre-trial stage was systemically restricted by national legislation (similar to *Beuze*). The Government in both cases failed to demonstrate convincingly the existence of exceptional circumstances to justify the restrictions on the applicants' right to assistance of a lawyer prior to and during interrogation. This means that the ECtHR had to apply very strict scrutiny to assess the fairness of proceedings as a whole. The ECtHR in *Van de Kolk* unanimously ruled that Van de Kolk's right to access to legal assistance during the pre-trial phase was violated. The ECtHR took into consideration that Van de Kolk had made incriminating statements during police interrogation in the absence of his lawyer, while he had explicitly requested to be assisted by his lawyer during that interrogation. Van de Kolk's statements were later used in evidence for his conviction.[84] According to the ECtHR, this factor was sufficient to constitute a violation of Article 6 § 3(c) ECHR, since the Government failed to convincingly demonstrate that there were exceptional circumstances to justify the restriction of Van de Kolk's right to legal assistance:

> "[…] the only reason not to allow the applicant's lawyer to be present at the interview was the fact that at the relevant time there was no right in the Netherlands providing for legal assistance during police questioning to adult suspects […]. The Court has previously held that such a general and mandatory restriction on the right to be assisted by a lawyer during the pre-trial phase of criminal proceedings does not constitute a compelling reason […][85] Whilst the absence of compelling reasons does not lead in itself to a finding of a violation of Article 6, such absence weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The burden of proof falls on the Government, which must demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer."[86]

In *Mehmet Ali Eser* the ECtHR unanimously ruled that Article 6 § 3(c) ECHR was not violated, despite the fact that also in this case the applicant had been denied access to a lawyer during interrogation due to a systemic restriction of this right at the time of the applicant's arrest. In *Mehmet Ali Eser* the Court observed that the applicant remained silent during

ECtHR 11 July 2019, ECLI:CE:ECHR:2019:0711JUD006231312 (*Olivieri/France*) for another comparison of two cases which to the eye seem very similar, but where the application of the *Ibrahim* test leads to different outcomes.

[84] ECtHR 28 May 2019, ECLI:CE:ECHR:2019:0528JUD002319215 (*Kolk/the Netherlands*), § 31-32.

[85] ECtHR 28 May 2019, ECLI:CE:ECHR:2019:0528JUD002319215 (*Kolk/the Netherlands*), § 32.

[86] ECtHR 28 May 2019, ECLI:CE:ECHR:2019:0528JUD002319215 (*Kolk/the Netherlands*), § 33.

interrogation, that no inferences were drawn from this silence, and that the applicant, when he gave statements before the public prosecutor and the investigating judge and later at trial, consistently denied the accusations against him. Lastly, the applicant's conviction was based on evidence other than his statements.[87] Taking all these factors into account, the ECtHR ruled unanimously that there had been no violation of Article 6 § 3 (c) ECHR.

2.1.3.2 The Criminal Defence Lawyer's Conduct in the Investigative Phase

The ECtHR as well as EU Directive 2013/48 do not provide any clear regulations on the criminal defence lawyer's conduct in the investigative phase. The Directive provides some guidelines in recital 25 (cited above), explaining what is to be regarded as effective participation during questioning by the police, but these guidelines are not binding on Member States. In many EU Member States, however, the criminal defence lawyer does not yet have a clearly defined role in this early stage of proceedings.[88] EU Directive 2013/48 invites Member States to reconsider the position of criminal defence lawyers in the pre-trial phase and also challenges legal professionals to re-evaluate their role in this important phase of criminal proceedings. Implementation of the EU Directive means that in most EU Member States some significant changes have to be made to the organisation of pre-trial investigation to ensure a more active role of the criminal defence lawyer. Internal control by judicial authorities on evidence gathering by the police is no longer relied upon unconditionally. Criminal defence lawyers now have the opportunity to act as an external control mechanism. The presence of a defence lawyer prior to and especially during police interrogation is an important safeguard against ill-treatment,[89] since the lawyer's presence can provide the necessary counterbalance against police powers[90] so that unauthorised pressure on accused persons can be avoided. The presence of a criminal defence lawyer during the early stages of criminal proceedings thus can be considered supportive rather than obstructive to the truth-finding character of the investigation, because the chances of false statements will most likely be reduced and the police and the prosecution will be encouraged to use more effective and different investigative methods.[91]

---

[87] ECtHR 15 October 2019, ECLI:CE:ECHR:2019:1015JUD000139907 (*Mehmet Ali Eser/Turkey*), § 53-58.
[88] Blackstock et al. 2014, p. 1.
[89] See for example the Statute of the International Tribunal for the former Yugoslavia, Art. 18(3); Cape and Namoradze 2012, p. 13.
[90] Cape and Namoradze 2012, p. 50.
[91] The EU Directive also explicates the right to have a lawyer present during other investigative and evidence-gathering acts, such as identity parades, confrontations and reconstructions of the scene of a crime. This is important, because evidence is not only gathered by interrogating the suspect, but also through all kinds of (forensic) investigative techniques (for example DNA, fingerprinting, telephone tapping). It could even be argued that nowadays interrogating the suspect is rather the capstone than the starting point of pre-trial investigations. See also: Cape and Namoradze 2012.

In light of this research, it will be interesting to consider whether there are rules on conduct for criminal defence lawyers in EU Member States related to providing legal assistance in the pre-trial phase, particularly prior to and during police interrogation. This is further explored in Chapter 3.

2.1.4 Providing Legal Assistance on the Basis of Legal Aid

For the right to legal assistance to be effective and practical the right to legal aid is essential;[92] without it, legal assistance would be merely illusory for accused persons who lack the financial resources to afford their own lawyer.[93] Article 6 § 3 (c) ECHR and Article 47 § 3 of the EU Charter therefore provide that free legal assistance should be available to indigent suspects and accused persons on the condition that the interests of justice require them to be legally represented. Provision of legal aid is thus based on a combined test of means (financial resources) and merits (interests of justice). Existing research shows that the provision of legal aid is the weak link in many criminal justice systems across the EU.[94] There is considerable variation in how states assess means and in the level of means determining indigence. Application procedures are often opaque and time-consuming. Remuneration under criminal legal aid schemes also varies widely among Member States and in some legal aid schemes expenditure is extremely low (less than € 1,- per inhabitant),[95] which raises concerns about compliance with the requirements of Article 6 § 3 (c) ECHR.[96]

With regard to the means test, the burden of proof with regard to the lack of means rests on the accused person,[97] but he does not have to prove 'beyond all doubt' that he lacks the means to pay for legal assistance himself.[98] With regard to the merits test, the ECtHR has distinguished three factors that should be taken into account in determining eligibility:[99]

(a) the seriousness of the offence and the severity of the potential sentence;[100]

---

[92] Flynn et al. 2016, p. 4.

[93] See SWD(2013) 476 final, p. 14; ECtHR 9 October 1979, ECLI:CE:ECHR:1981:0206JUD000628973 (*Airey/Ireland*), § 26.

[94] See for example: Spronken et al 2009 and Cape et al. 2010.

[95] Spronken et al. 2009, p. 71.

[96] See also the Impact Assessment accompanying the proposal Directive on legal aid, SWD(2013) 476 final and SWD(2013) 477 final (executive summary).

[97] ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*), § 37; ECtHR 21 June 2011, ECLI:CE:ECHR:2011:0621JUD002965204 (*Orlov/Russia*), § 114.

[98] ECtHR 25 April 1983, ECLI:CE:ECHR:1983:0425JUD000839878 (*Pakelli/Germany*), § 34.

[99] ECtHR 24 May 1991, ECLI:CE:ECHR:1991:0524JUD001274487 (*Quaranta/Switzerland*), § 35.

[100] ECtHR (GC) 10 June 1996, ECLI:CE:ECHR:1996:0610JUD001938092 (*Benham/UK*), § 60; ECtHR 24 May 1991, ECLI:CE:ECHR:1991:0524JUD001274487 (*Quaranta/Switzerland*), § 33; ECtHR 6 November 2012, ECLI:CE:ECHR:2012:1106JUD003223804 (*Zdravko Stanev/Bulgaria*), § 38.

(b) the complexity of the case;[101] and

(c) the social and personal situation of the accused.[102]

Denial of legal aid during periods in which procedural acts, including questioning and medical examinations, are carried out is considered unacceptable,[103] so that the merits test is usually satisfied when deprivation of liberty is at stake.[104]

Earlier[105] it was noted that the right to legal assistance also included the right to be assisted by a lawyer of one's own choosing. The right to freedom of choice is, however, quite ambiguous when it concerns legal representation on the basis of legal aid.[106] The ECtHR[107] uses the starting point that free choice of a lawyer should also be respected when the suspect or accused person receives legal aid, however, circumstances may require that this right is restricted. Similarly, the EU Directive 2016/1919 on legal aid[108] provides that a suspect's or accused person's request to have his assigned lawyer replaced, should be granted if

---

[101] ECtHR 24 May 1991, ECLI:CE:ECHR:1991:0524JUD001274487 (*Quaranta/Switzerland*), § 34; ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001319187 (*Pham Hoang/France*), §40; ECtHR 8 June 1998, ECLI:CE:ECHR:1998:0609JUD002429494 (*Twalib/Greece*), § 53.

[102] ECtHR 6 November 2012, ECLI:CE:ECHR:2012:1106JUD003223804 (*Zdravko Stanev/Bulgaria*), § 38.

[103] ECtHR 20 June 2002, ECLI:CE:ECHR:2002:0620JUD002771595 (*Berlinski/Poland*).

[104] ECtHR (GC) 10 June 1996, ECLI:CE:ECHR:1996:0610JUD001938092 (*Benham/UK*), § 61; ECtHR 24 May 1991, ECLI:CE:ECHR:1991:0524JUD001274487 (*Quaranta/Switzerland*), § 33 and ECtHR 6 November 2012, ECLI:CE:ECHR:2012:1106JUD003223804 (*Zdravko Stanev/Bulgaria*), § 38.

[105] See paragraph 2.1.3.

[106] Cape et al. 2010, p. 40-41.

[107] ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*), § 79: "Notwithstanding the importance of the relationship of confidence between a lawyer and his client, this right is not absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them (see Croissant v. Germany, 25 September 1992, § 29, Series A no. 237-B). The Court has consistently held that the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (ibid., § 29; see also Meftah and Others v. France [GC], nos. 32911/96, 35237/97 and 34595/97, § 45, ECHR 2002-VII; Mayzit v. Russia, no. 63378/00, § 66, 20 January 2005; Klimentyev v. Russia, no. 46503/99, § 116, 16 November 2006; Vitan v. Romania, no. 42084/02, § 59, 25 March 2008; Pavlenko, cited above, § 98; Zagorodniy v. Ukraine, no. 27004/06, § 52, 24 November 2011; and Martin, cited above, § 90). Where such grounds are lacking, a restriction on the free choice of defence counsel would entail a violation of Article 6 § 1 together with paragraph 3 (c) if it adversely affected the applicant's defence, regard being had to the proceedings as a whole (ibid., § 31; see also Meftah and Others, cited above, §§ 46-47; Vitan, cited above, §§ 58-64; Zagorodniy, cited above, §§ 53-55; and Martin, cited above, §§ 90-97)."; ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*), § 29; ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*), § 54.

[108] Directive 2016/1919/EU (OJ 2016, 297/1), transposition date is set on 25 May 2019 (Article 12). In anticipation of this Directive the Commission already published a Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings on 27 November 2013 (2013/C378/03, Official Journal of the European Union C 378/11).

circumstances allow.[109] EU Directive 2016/1919 furthermore urges Member States to ensure that an effective legal aid system is in place. This system should be of adequate quality, which means that Member States must ensure that "legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession".[110] Consequently, it is the Member States responsibility to ensure that adequate training is available for lawyers who provide legal aid services.[111] The Directive does not mention that remuneration for lawyers who provide legal aid services should also be sufficient in order to encourage legal aid service providers to ensure a certain level of quality.[112]

Since the right to criminal legal aid is inextricably linked to the effectiveness of legal representation in criminal proceedings, the deontological issues attached to the provision of legal aid services are worth exploring in this research. For example, which regulations are in place to safeguard the confidential character of the information that the lawyer has to share to support the application for legal aid? And is a defence lawyer allowed to negotiate private payments from a client, when this client is entitled to legal aid?

2.2 The Criminal Defence Lawyer as Strategic Adviser: The Right to have Adequate Time and Facilities to Prepare the Defence

Without a proper preparation of his defence, the accused will not be able to truly influence proceedings.[113] The right to have adequate time and facilities to prepare the defence is clearly based on the principle of equality of arms and, as such, forms a vital element of the right to effective criminal defence and of the right to a fair trial in general (Article 6 § 3 (b) ECHR). Adequate and effective preparation of his defence means that the accused person needs (1) sufficient time, (2) proper information about the prosecution's case against him, and (3) this information needs to be in a language the accused person understands. In this

[109] Directive 2016/1919/EU, Art. 7(4).
[110] Directive, Art. 7 (1-3).
[111] See also: ECtHR 19 December 1989, ECLI:CE:ECHR:1989:1219JUD000978382 (*Kamasinski/Austria*), § 65; ECtHR 24 November 1993, ECLI:CE:ECHR:1993:1124JUD001397288 (*Imbrioscia/Switzerland*), § 41; ECtHR 21 April 1998, ECLI:CE:ECHR:1998:0421JUD002260093 (*Daud/Portugal*), § 38.
[112] Insufficient remuneration for legal aid arguably has a negative effect on the quality and effectiveness of legal representation in legal aid cases, see: Cape and Namoradze 2012, p. 425.
[113] ECtHR 30 September 1985, ECLI:CE:ECHR:1985:0930JUD000930081 (*Can/Austria*); see also ECtHR 15 November 2007, ECLI:CE:ECHR:2007:1115JUD002698603 (*Galstyan/Armenia*), § 84.

regard, the EU Directives on the right to information[114] and the right to interpretation and translation[115] in criminal proceedings are also relevant.

2.2.1 Relevant Regulations

The right to information as such is not explicitly guaranteed by the ECHR or the EU Charter. As is shown later, according to the ECtHR this right is implied in Article 6 ECHR. Article 6 § 3 (b) ECHR provides:

> "Everyone charged with a criminal offence has the following minimum rights: […] (b) to have adequate time and facilities for the preparation of his defence […]"

Article 48 EU Charter reads in general:

> "Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

Recitals 22 and 23 of EU Directive 2013/48 on access to a lawyer in particular address the importance of confidential lawyer-client communication when preparing the defence:

> "(22) Suspects or accused persons should have the right to meet in private with the lawyer representing them. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the circumstances of the proceedings, in particular the complexity of the case and the procedural steps applicable. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the suspect or accused person, in the place where such a meeting is conducted. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to meet their lawyer.

[114] Directive 2012/13/EU (OJ 2012, L 142/1). Article 7 § 2 provides: "Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence."

[115] Directive 2010/64/EU (OJ 2010, L 280/1). Article 3 provides that accused persons who do not understand the language of the criminal proceedings shall receive "a written translation of all documents which are essential to ensure that they are able to exercise their right of defence". The competent authorities shall decide whether a document is essential in this regard, but the accused person can submit a reasoned request to this effect.

> (23) Suspects or accused persons should have the right to communicate with the lawyer representing them. Such communication may take place at any stage, including before any exercise of the right to meet that lawyer. Member States may make practical arrangements concerning the duration, frequency and means of such communication, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to communicate with their lawyer."

EU Directive 2010/64 on interpretation and translation[116] contains several relevant provisions:

> "Communication between suspected or accused persons and their legal counsel should be interpreted in accordance with this Directive. Suspected or accused persons should be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence." (Recital 19)

This is further detailed in Article 2 §§ 1 and 2:

> "1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.
> 2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications."

This Directive, in Article 3, furthermore explicates the right of the accused person to have relevant and essential documents translated.

Lastly EU Directive 2012/13 on the right to information[117] regulates the right of an accused person to be informed of his defence rights (Article 3) promptly, the right to be

[116] Directive 2010/64/EU (OJ 2010, L 280/1).
[117] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012, L 142/1.

informed of the accusation (Article 6) and the right to have access to the materials of the case (Article 7).

2.2.2 Adequate Time and Adequate Facilities

According to standing ECtHR case law the time necessary for preparation of the defence depends on the specific circumstances of the case.[118] Relevant circumstances include: the complexity of the case, the severity of the potential sentence and whether the accused person is assisted by counsel.[119] Also the criminal defence lawyer's workload can be taken into account when deciding whether there was adequate time to prepare the defence. At the same time the lawyer should show a certain degree of flexibility when scheduling time to prepare the defence.[120] Adequate time is also important for establishing a solid working relationship with the accused person based on mutual trust. The criminal defence lawyer has to show that he invests the time necessary to properly assist his client.

With regard to the element of adequate facilities the ECtHR ruled that this includes the right to have access to and information about the case file and evidence,[121] including the right to obtain copies of the case file.[122] This is, however, not an exclusive and absolute right of the accused; under certain circumstances it will be sufficient when the accused receives this information through his representative.[123] The right to adequate facilities also includes the right to have confidential lawyer-client consultations,[124] which is also essential for building the confidential working relationship referred to earlier. Furthermore, it means that

[118] ECtHR 28 June 2011, ECLI:CE:ECHR:2011:0628JUD002019703 (*Miminoshvili/Russia*), § 142.
[119] ECtHR 7 October 2008, ECLI:CE:ECHR:2008:1007JUD003522803 (*Bogumil/Portugal*), §§ 48-49.
[120] ECmHR 12 October 1978, ECLI:CE:ECHR:1978:1012DEC000790977 (*X and Y/Austria*), section 3(c): "When determining the length of the preparatory time needed, the court must take into account not only the complexity of the case, but also the usual workload of a barrister who certainly cannot be expected to change his while programme in order to devote all his time to a legal aid case in which he has been appointed as defence counsel. On the other hand it is not unreasonable to require a defence lawyer to arrange at least some shifts in the emphasis of his work if this is necessary in view of the special urgency of a particular case, even if it is a legal aid case." See also: ECtHR 31 March 2005, ECLI:CE:ECHR:2005:0331DEC006211600 (*Mattick/Germany*).
[121] ECtHR 31 March 2009, ECLI:CE:ECHR:2009:0331JUD002102204 (*Natunen/Finland*), §§ 40-41.
[122] ECtHR 28 April 2009, ECLI:CE:ECHR:2009:0428JUD003888605 (*Rasmussen/Poland*), §§ 48-49; ECtHR 9 October 2008, ECLI:CE:ECHR:2008:1009JUD006293600 (*Moiseyev/Russia*), § 213-218; ECtHR 24 April 2007, ECLI:CE:ECHR:2007:0424JUD003818403 (*Matyjek/Poland*), § 59; ECtHR 26 June 2008, ECLI:CE:ECHR:2008:0626JUD001559103 (*Seleznev/Russia*), §§ 64-69.
[123] ECtHR 21 September 1993, ECLI:CE:ECHR:1993:0921JUD001235086 (*Kremzow/Austria*), §52; ECtHR 19 December 1989, ECLI:CE:ECHR:1989:1219JUD000978382 (*Kamasinski/Austria*), § 88.
[124] For example: ECtHR 31 January 2002, ECLI:CE:ECHR:2002:0131JUD002443094 (*Lanz/Austria*), § 50.

accused persons should benefit from detention conditions allowing them to have sufficient opportunities to read and write and prepare their defence.[125]

Lastly, proper preparation of the defence strategy requires adequate consultation between the lawyer and the suspect or accused person. During such consultation, free and unrestricted exchange of information between the lawyer and his client is paramount. In *M.M.*[126] the complainant M.M. was an employee of the Dutch Intelligence and Security Service (*AIVD*). In this capacity M.M. was under an obligation of secrecy, which prevented him from fully disclosing all information necessary for his defence with his lawyer. Sharing this information could violate his obligation of secrecy, which could lead to further prosecution. According to the ECtHR, it could not be expected from M.M. to weigh the importance of full disclosure to his lawyer against the risk of prosecution. Consequently, free and unrestricted communication between M.M. and his lawyer was irretrievably compromised and the ECtHR found that Article 6 § 3 (c) ECHR had been violated.[127]

In sum, it can be concluded that both the State and the criminal defence lawyer have a responsibility with regard to the preparation of the defence. The State needs to safeguard the accused's right to have adequate time and facilities to prepare the defence, for example by allowing him access to the case file, ensuring that he has sufficient opportunity to read and write and prepare his defence and provide interpretation and translation if necessary. On the other hand, the criminal defence lawyer is responsible for organising his workload in a way that allows him to have sufficient time to deal with each client's case and can maintain a confidential working relationship with the accused person in order to prepare the defence adequately. In doing so, it is obvious that becoming acquainted with the prosecution's case is essential. The prosecution is, however, not always eager to share case file information, because this might harm the criminal investigation. In the end, dealing with the right to information requires a continuous balance of interests of the accused to have all the information he needs as early in criminal proceedings as possible against the criminal investigation which might sometimes benefit from keeping the accused uninformed about specific case file information.

2.2.3 Right to Information: Access to Case Materials

According to EU Directive 2012/13 on the right to information suspects and accused persons have the right to be informed of applicable procedural rights, which should ideally be

[125] ECtHR 20 January 2005, ECLI:CE:ECHR:2005:0120JUD006337800 (*Mayzit/Russia*), § 81; ECtHR 9 October 2008, ECLI:CE:ECHR:2008:1009JUD006293600 (*Moiseyev/Russia*), § 221.
[126] ECtHR 25 July 2017, ECLI:CE:ECHR:2017:0725JUD000215610 (*M.M./the Netherlands*).
[127] ECtHR 25 July 2017, ECLI:CE:ECHR:2017:0725JUD000215610 (*M.M./the Netherlands*), §§ 92-97.

provided to the suspect or accused person in a Letter of Rights.[128] Such procedural rights include for example the right to challenge the lawfulness of the arrest, obtain release from detention, right to have the assistance of a lawyer including the right to confidentially communicate with this lawyer, the right to interpretation and translation if necessary and the right to silence. Furthermore, the suspect or accused person has the right to be informed of the nature of the accusation.[129] Lastly, the suspect or accused person has the right to have access to case materials and material that he might need to challenge the lawfulness of his detention.[130]

In light of this research, the right to access case materials is particularly relevant. Since not all criminal justice systems know the concept of a case file,[131] access to information during the investigative phase will in practice be quite differently organised depending on the criminal justice system. To avoid confusion, the term 'case file' is avoided and the term 'case materials' is used to refer to any information related to the accused's case.

The right to have access to case materials during the investigative phase, which is based on the notion of equality of arms, is applicable irrespective of the type of criminal justice system. Even more so, in common law systems the defence generally has more possibilities (in theory) to conduct its own investigation. However, since most accused persons simply lack the financial resources to carry out these investigations, the defence in a common law system is equally dependent on the disclosure of case material by the police (or the prosecution).

The right to have access to case materials is laid down in Article 7 of EU Directive 2012/13. Even though it is not explicitly articulated in Article 6 ECHR, according to standing ECtHR case law it is implied by Article 6 § 3 (b) ECHR.[132] The right to information is not absolute, in the sense that it does not guarantee unlimited access to case materials throughout proceedings. Particularly in the initial phase of criminal proceedings, the interests of the criminal investigations might impede full disclosure of case materials.[133] Case materials should be

[128] Recital 22 and Article 3 – 5.
[129] Recital 28 - 29 and Article 6
[130] Recital 30 – 34 and Article 7
[131] Particularly the criminal justice system based on a common law tradition generally do not have one case file; all evidence is gathered by both parties and presented separately to the court at trial.
[132] ECmHR 15 October 1980, ECLI:CE:ECHR:1980:1015DEC000840378 (*Jespers/Belgium*), § 88; see also for instance ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002511694 (*Schöps/Germany*); ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002354194 (*Garcia Alva/Germany*); ECtHR 31 March 2009, ECLI:CE:ECHR:2009:0331JUD002031002 (*Plonka/Poland*); ECtHR 24 September 2009, ECLI:CE:ECHR:2009:0924JUD000702504 (*Pishchalnikov/Russia*).
[133] ECtHR 9 April 2015, ECLI:CE:ECHR:2015:0409JUD003046013 (*A.T./Luxembourg*), §§ 79-84. The Court particularly considered that "Article 6 of the Convention cannot be interpreted as guaranteeing unlimited access to the criminal case file before the first interrogation by the investigating judge where the domestic authorities have sufficient reasons relating to the protection of the interests of justice not to impede the effectiveness of the investigations." (§ 81)

provided by the prosecution as soon as possible, at a time that is most essential to the defence and it is in any case not sufficient to provide merely abstracts of the material or an oral account of the facts and evidence.[134] Moreover, the ECtHR recognises that timely disclosure is essential for challenging the lawfulness of arrest or detention.[135] This standing ECtHR case law is reflected in EU Directive 2012/13.

From the criminal defence lawyer's perspective disclosure of case materials is essential for providing proper legal advice. Without knowledge of the prosecution's case against the accused, it is virtually impossible to advise the accused on the best defence strategy other than invoking his right to silence at least until there is more information available.[136] Several deontological questions arise with regard to the right to access case materials. For example, how should the criminal defence lawyer react when he is offered access to case materials under the condition that he is not allowed to communicate this information to his client? What would the effect of this situation be on the confidential lawyer-client relationship? And how is the criminal defence lawyer able to advise his client properly on invoking his right to silence, if he does not have sufficient information on the prosecution's case?

2.2.4 The Right to Interpretation and Translation

Understanding the language of the proceedings is a prerequisite to fully and effectively participate in the proceedings.[137] According to the ECtHR, the assistance of an interpreter enables the accused to defend himself[138] and to have knowledge of the case against him and to share his version of the facts with the court.[139] As such the right to interpretation and translation (free of charge) is an important aspect of the right to a fair trial (Article 6 § 3 (c) ECHR).[140] This right extends to the investigative phase, which means that the accused is entitled to have the assistance of an interpreter when questioned by the police.[141]

---

[134] ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002511694 (*Schöps/Germany*), § 47-55; ECtHR 9 July 2009, ECLI:CE:ECHR:2009:0709JUD001136403 (*Mooren/Germany*), §§ 121-125; EU Directive 2012/13, recital 30. Access should also be provided free of charge, although costs that have to be made for copies or sending material to the persons concerned or the lawyers can be charged according to national law (EU Directive 2012/13, Art. 7 § 5 and recital 34).

[135] EU Directive 2012/13, Art. 7.

[136] Blackstock et al. 2014, p. 290.

[137] ECtHR 19 December 1989, ECLI:CE:ECHR:1989:1219JUD000978382 (*Kamasinski/Austria*), § 79; ECtHR (GC) 18 October 2006, ECLI:CE:ECHR:2006:1018JUD001811402 (*Hermi/Italy*), § 68.

[138] ECtHR 19 December 1989, ECLI:CE:ECHR:1989:1219JUD000978382 (*Kamasinski/Austria*), § 74.

[139] ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*), § 61.

[140] ECtHR 28 November 1978, ECLI:CE:ECHR:1980:0310JUD000621073 (*Luedicke, Belkacem and Koç/Germany*), § 46.

[141] See for example ECtHR 14 October 2014, ECLI:CE:ECHR:2014:1014JUD004544004 (*Baytar/Turkey*), § 59; ECtHR 5 April 2011, ECLI:CE:ECHR:2011:0405JUD003529205 (*Şaman/Turkey*), § 36.

EU Directive 2010/64 on the right to interpretation and translation[142] requires EU Member States to have procedures and mechanisms in place to ascertain whether an accused is in need of an interpreter and/or translator[143] and to ensure that interpretation is made available, where necessary. Accused persons who do not speak or understand the language of the proceedings must be provided with interpretation throughout criminal proceedings.[144] This includes appropriate assistance for persons with hearing or speech impediments.[145] Moreover, Member States have to ensure that essential documents are translated if necessary in order for the suspect to understand criminal proceedings.[146] The competent authorities determine whether documents are essential, although the accused or his criminal defence lawyer can request for certain documents to be translated.[147] In any event, the custody decision, indictment or charge and any judgment have to be translated.[148] Additionally, the accused should have the possibility to challenge any decision of the authorities that there is no need for translation of certain documents.[149] The quality of interpretation and translation has to be supervised by the Member States.[150] Moreover, translators and interpreters have a duty of confidentiality, which has to be guaranteed by the Member States.[151]

It follows from the foregoing that the right to interpretation and translation is a fundamental aspect of the right to a fair trial. The question which is relevant in the context of this research is, however, whether this right also extends to lawyer-client communication, in case language barriers occur between them? The European Commission of Human Rights (ECmHR) makes a distinction between a suspect who pays for his ow lawyer and a suspect whose lawyer is appointed on the basis of legal aid. When the suspect pays for his own lawyer, it is reasonable to expect that the suspect chooses a lawyer with whom he can communicate in a language they both understand and if necessary that he ensures an interpreter is present to assist them when they communicate. If a lawyer is appointed on the basis of legal aid, the State should ensure that the lawyer can communicate in a language the suspect understands and if necessary should provide for the assistance of an interpreter.[152] Moreover, Member States have the responsibility to guarantee the quality of

[142] Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280/1, 26 October 2010).
[143] Directive 2010/64/EU, Art. 2 § 4.
[144] Directive 2010/64/EU, Art. 2 § 1.
[145] Directive 2010/64/EU, Art. 2 § 3.
[146] Directive 2010/64/EU, Art. 3 § 1.
[147] Directive 2010/64/EU, Art. 3 § 3.
[148] Directive 2010/64/EU, Art. 3 § 2.
[149] Directive 2010/64/EU, Recital 25 and Art. 3 § 5.
[150] Directive 2010/64/EU, Recital 24 and Art. 5.
[151] Directive 2010/64/EU, Art. 5 § 3.
[152] ECmHR 29 May 1975, ECLI:CE:ECHR:1975:0529DEC000618573 (*X/Austria*), § 1. See also ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*), § 62.

interpretation.[153] According to the EU Directive on the right to interpretation and translation the right to assistance of an interpreter during lawyer-client communication is part of the right to a fair trial:

> "Suspects or accused persons should be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence."[154]

Assistance of an interpreter in lawyer-client communication is, however, limited to communication which is in "direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications."[155]

With the increasing participation of criminal defence lawyers in the investigative phase, the applicability of the right to interpretation in lawyer-client communication becomes even more pressing. What happens if the only available interpreter to assist the lawyer and the suspect in their communication is the police station interpreter, who also assists during police interrogations? Given the confidential nature of lawyer-client communication it would be preferable that different interpreters are used. Potential conflicts of interests could arise when the same interpreter assists during lawyer-client communications and the police interrogation. Research shows that this issue is not easily solved, because many factors are determinative for the availability of a qualified interpreter (for example whether it concerns an uncommon language).[156] What is the lawyer's professional responsibility in this regard: does he have to insist on the appointment of a separate interpreter even though this might cause delays and therefore prolong his client being held in custody?

2.2.5 The Right to Investigate and the Right to Examine Witnesses

Effective criminal defence calls for an independent right of the suspect or accused person to investigate facts that are relevant for the determination of his guilt or innocence.[157] An important defence right in this respect is the right of the accused person to examine witnesses or to have witnesses examined (Article 6 § 3 (d) ECHR). This right derives directly from the principle of equality of arms[158] and the right to an adversarial trial, both inherent

[153] ECtHR 19 December 1989, ECLI:CE:ECHR:1989:1219JUD000978382 (*Kamasinski/Austria*), § 74; see also Directive 2010/64/EU, OJ 2010, L 280/1, Art. 5.
[154] Directive 2010/64/EU, Recital 19.
[155] Directive 2010/64/EU, Art. 2 § 2.
[156] Blackstock et al. 2014, p. 164-166.
[157] Cape and Namoradze 2012, p. 75.
[158] ECtHR 18 March 1997, ECLI:CE:ECHR:1997:0318JUD002220993 (*Foucher/France*), § 34.

features of the right to a fair trial. However, the right of an accused to examine witnesses is not absolute,[159] nor does it oblige authorities to ensure that every witness for the defence has to attend trial.[160] On the other hand, dismissing an accused's request to hear witnesses has to be properly motivated if the request itself is also sufficiently substantiated.[161]

With regard to the principle of equality of arms it is relevant to discuss the use of witness statements in evidence when the defence did not have the opportunity to examine the particular witness for example because it concerned anonymous witnesses or because the witness died before the trial. For many years the ECtHR applied the 'sole and decisive rule' as a rather absolute rule:

> "[…] it should be recalled that even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements"[162]

and

> "[…] where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence *are restricted* to an extent that is incompatible with the guarantees provided by Article 6."[163] [emphasis added]

Consequently, the impugned statement should have been excluded from evidence and the defendant's right to a fair trial was considered violated when his conviction was based solely and decisively on that statement. In 2011 the Grand Chamber, in *Al-Khawaja and Tahery v. The United Kingdom* took a more nuanced approach:

> "[…] when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of

[159] For example ECtHR 20 January 2005, ECLI:CE:ECHR:2005:0120DEC003059802 (*Accardi and others/Italy*).
[160] For example: ECtHR (GC) 6 May 2003, ECLI:CE:ECHR:2003:0506JUD004889899 (*Perna/Italy*), § 29; ECtHR 31 October 2001, ECLI:CE:ECHR:2001:1031JUD004702399 (*Solakov/the Former Yugoslav Republic of Macedonia*), § 57.
[161] ECtHR 10 October 2013, ECLI:CE:ECHR:2013:1010JUD005135510 (*Topić/Croatia*), § 42; see also ECtHR 29 January 2009, ECLI:CE:ECHR:2009:0129JUD007701801 (*Polyakov/Russia*), §§ 34-35.
[162] ECtHR 26 March 1996, ECLI:CE:ECHR:1996:0326JUD002052492 (*Doorson/the Netherlands*), § 76.
[163] ECtHR 27 February 2001, ECLI:CE:ECHR:2001:0227JUD003335496 (*Lucà/Italy*), § 40. See also ECtHR 24 November 1986, ECLI:CE:ECHR:1986:1124JUD000912080 (*Unterpertinger/Austria*), §§ 31-33.

> the defence *may be restricted* to an extent that is incompatible with the guarantees provided by Article 6 (the "sole or decisive rule")."[164] [emphasis added]

Subsequently, the ECtHR applied this updated approach to the question whether the rights as enshrined in Article 6 § 3 (d) ECHR have been breached if the conviction has been based solely and decisively on witness statements, which could not have been challenged by the defence. Firstly, it has to be examined whether there was a 'good reason' for the non-attendance of the witness at trial. According to the ECtHR, the authorities have a positive obligation to enquire extensively whether absence is justified.[165] Secondly, a conviction can be solely and decisively based on the evidence of absent witnesses, provided that there are "sufficient counterbalancing factors in place".[166] Particularly the reliability of the evidence has to be carefully assessed. This assessment is determined by the importance of the evidence in the specific case, which inevitably is heavily dependent on the particular circumstances of the case. Generally, it could be said though that the more important or decisive the statement, the more supporting evidence is needed to illustrate the reliability of that statement. In sum, the ECtHR goes through three steps, after considering whether there was a good reason for non-attendance of the witness:

> "[…] firstly, whether it was necessary to admit the witness statements […] secondly, whether their untested evidence was the sole or decisive basis for each applicant's conviction; and thirdly, whether there were sufficient counterbalancing factors including strong procedural safeguards to ensure that each trial, judged as a whole, was fair within the meaning of Article 6 §§ 1 and 3 (d)."[167]

According to the ECtHR, procedural safeguards are only sufficient as a counterbalance, when they are effective. For example, when the witness during examination by the defence persists in invoking his right to silence if testifying would cause him to incriminate himself, questioning this witness is actually futile[168] rendering the counterbalancing factors insufficient.

---

[164] ECtHR (GC) 15 December 2011, ECLI:CE:ECHR:2011:1215JUD002676605 (*Al-Khawaja and Tahery/UK*), § 119.
[165] ECtHR (GC) 15 December 2011, ECLI:CE:ECHR:2011:1215JUD002676605 (*Al-Khawaja and Tahery/UK*), §§ 120-125. Good reasons are for example the death of the witness or reasonable and objective fear of testifying in open court.
[166] ECtHR (GC) 15 December 2011, ECLI:CE:ECHR:2011:1215JUD002676605 (*Al-Khawaja and Tahery/UK*), § 147.
[167] ECtHR (GC) 15 December 2011, ECLI:CE:ECHR:2011:1215JUD002676605 (*Al-Khawaja and Tahery/UK*), § 152. See also ECtHR 15 December 2015, *Schatschaschwili v. Germany*, no. 9154/10, § 107.
[168] ECtHR 10 July 2012, ECLI:CE:ECHR:2012:0710JUD002935306 (*Vidgen/the Netherlands*), § 47.

The principles as developed in *Al-Khawaja and Tahery* were further refined by the Grand Chamber in 2015, when it gave its judgment in *Schatschaschwili*.[169] First, it considered that the lack of a good reason for non-attendance of the witness does not in itself constitute a breach of Article 6 ECHR. However, at the same time, the lack of a good reason is an important factor in assessing the overall fairness of the trial and "may tip the balance in favour of finding a breach" of Article 6 ECHR.[170] Second, the Grand Chamber clarified that the level of importance of the witness statement is decisive for the extent of the counterbalancing factors needed to justify the use of this evidence.[171] Third, with regard to the order in which the steps of the *Al-Khawaja* test have to be taken, the Court considered that the order as provided in the *Al-Khawaja* judgment is leading. Yet, it may be

> "[…] appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings".[172]

All in all, the way in which this judgment is articulated is rather confusing and also the fact that the decision was reached with a 9 to 8 majority does put the importance of this decision for the development of the doctrine on the use of untested statements as the sole and decisive evidence for an accused person's conviction into perspective.[173]

In the context of this research it is important to note that departing from the sole and decisive rule means that the conduct of the defence and particularly of the criminal defence lawyer might have an impact on the evaluation of procedural safeguards as counterbalancing factors. For instance, will the defence be held accountable for not having taken the earliest possible opportunity to complain about not being able to question witnesses and to request their appearance at trial? And if the defence did not actively pursue possibilities to test the

[169] ECtHR (GC) 15 December 2015, ECLI:CE:ECHR:2015:1215JUD000915410 (*Schatschaschwili/Germany*).
[170] ECtHR (GC) 15 December 2015, ECLI:CE:ECHR:2015:1215JUD000915410 (*Schatschaschwili/Germany*), § 113.
[171] ECtHR (GC) 15 December 2015, ECLI:CE:ECHR:2015:1215JUD000915410 (*Schatschaschwili/Germany*), § 116.
[172] ECtHR (GC) 15 December 2015, ECLI:CE:ECHR:2015:1215JUD000915410 (*Schatschaschwili/Germany*), § 118.
[173] For a more in-depth case analysis of the right to examine witnesses see for example: E. Widder, "The right to challenge witnesses – An application of Strasbourg's flexible 'sole and decisive' rule to other human rights", *Cambridge Journal of International and Comparative Law*, Vol. 22, Issue 4 (2014), p. 1084-1097; Wilde 2015; B. de Wilde, "A fundamental review of the ECHR right to examine witnesses in criminal cases", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 22, Issue 4 (2014), p. 331-350; L. van Lent & B. Leeuw, "Rechtspraak EHRM", *DD* 2016/13; ECtHR 13 December 2011, ECLI:CE:ECHR:2011:1213JUD002088309 (*Ajdarić/Croatia*), *EHRC* 2012/55, m.nt. Spronken; B. de Wilde, "Het arrest Al-Khawaja & Tahery: het ondervragingsrecht uitgekleed?", *DD* 2016/26; ECtHR 20 January 2009, ECLI:CE:ECHR:2009:0120JUD002676605 (*Al-Khawaja and Tahery/UK*), *EHRC* 2009/39, m.nt. Dreissen.

reliability of the witness statements, will this passiveness be taken into account? And if so, what should the defence lawyer then do if his code of conduct prohibits him from contacting witnesses before trial? Particularly in criminal justice systems which are primarily based on inquisitorial principles, it is not self-evident that the defence has unlimited access to witnesses in the investigative phase. It will be interesting to explore whether the rules of conduct contain any regulations regarding the defence lawyer's contact with witnesses throughout (criminal) proceedings.

2.2.6 Advising the Client on Settling the Case and on his Right to Silence

Settling the case (outside of court) often leads to speedier proceedings, which can be beneficial to all parties involved. Moreover, an agreement may benefit the accused, who will often have to serve a lighter sentence. However, settling the case outside of court can also have its downside. An agreement often entails the accused's waiver of essential procedural rights such as the right to have the merits of his case examined by an independent and impartial tribunal. According to the ECtHR this does not make settling the case (in this particular case it concerned a plea bargain) in itself improper or in violation of the ECHR.[174] However, it is important to furnish the process of plea bargaining with the necessary safeguards. The ECtHR therefore formulates the following conditions:

> "(a) the [plea-]bargain had to be accepted by the applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review."[175]

These conditions show resemblance to the conditions attached to the waiver of procedural rights. The criminal defence lawyer plays an important role in thoroughly advising the suspect on these aspects.

Regarding the right to silence, it is settled ECtHR case law that this right and the right not to incriminate oneself are fundamental features of the concept of fair trial, being "generally recognised international standards which lie at the heart of the notion of a fair procedure."[176]

---

[174] ECtHR 29 April 2004, ECLI:CE:ECHR:2014:0429JUD000904305 (*Natsvlishvili and Togonidze/Georgia*), § 90.
[175] ECtHR 29 April 2004, ECLI:CE:ECHR:2014:0429JUD000904305 (*Natsvlishvili and Togonidze/Georgia*), § 92.
[176] ECtHR 25 February 1993, ECLI:CE:ECHR:1993:0225JUD001082884 (*Funke/France*), §§ 41-44; ECtHR 17 (GC) December 1996, ECLI:CE:ECHR:1996:1217JUD001918791 (*Saunders/UK*), § 68; ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*), § 45; ECtHR 21 December 2000, ECLI:CE:ECHR:2000:1221JUD003472097 (*Heaney and McGuinness/Ireland*), § 40; ECtHR 22 July 2008, ECLI:CE:ECHR:2008:0722JUD001030103 (*Getiren/Turkey*), § 123.

EU Directive 2012/13 on the right to information regulates that suspects have to be informed promptly of their defence rights including the right to remain silent.[177]

The privilege against self-incrimination and the right to remain silent protect the suspect against improper compulsion by the authorities and as such contribute to avoiding miscarriages of justice and to the fulfilling the aims of Article 6 ECHR.[178] Additionally, the ECtHR has frequently emphasised the importance of the defence lawyer's presence during the initial stages of criminal proceedings, especially prior to and during police interrogation by linking the right to remain silent and the privilege against self-incrimination to the right to legal assistance:

> "[…] early access to a lawyer is part of the procedural safeguards to which the court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination".[179]

In practice, it is rather difficult to remain silent during police interrogation, when the suspect is continuously confronted with questions from the investigating authorities. The police are not prohibited from asking questions simply because the suspect invokes his right to silence. Even more so, sometimes the police claim to feel obliged to keep posing questions in order to allow the suspect to react to the allegations.[180] With the assistance of a criminal defence lawyer the suspect will presumably be better able to determine whether or not to invoke silence and to persevere in his decision.

Yet, it is important to note that silence is not always the best strategy. In order to properly advise the suspect, the defence lawyer needs to be informed of the prosecution's case. Indeed, the amount and strength of the evidence against the suspect will determine whether silence is the best defence strategy. A similar situation occurs when advising a suspect on plea bargaining. Without adequate prosecution disclosure in the early stages of proceedings, appropriate advice on plea bargaining is difficult if not impossible to provide; at the same time waiting for sufficient prosecution disclosure might be detrimental to the accused's position.

In practice, however, prosecution disclosure is very rare during the initial phase of investigations. The only accurate legal advice in the absence of proper prosecution disclosure is to invoke silence or plead not guilty, and wait until more information becomes available. Yet, in many criminal justice systems adverse inferences can be drawn from a suspect's silence during the investigative phase (implicitly or explicitly) later in proceedings.[181]

---

[177] Directive 2012/13/EU, OJ 2012, L 142/1, Art. 3 § 1e.
[178] ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), § 54-55.
[179] ECtHR 24 September 2009, ECLI:CE:ECHR:2009:0924JUD000702504 (*Pishchalnikov/Russia*), § 69.
[180] Blackstock et al. 2014, p. 382.
[181] Blackstock et al. 2014, p. 380.

According to the ECtHR, drawing adverse inferences in itself does not contradict the privilege against self-incrimination.[182] In *John Murray*[183] the ECtHR was confronted with the question whether the right to silence and the privilege against self-incrimination are absolute. In particular the question was whether the fact that the suspect invoked his right to silence could be used against him at trial and if a warning from the authorities that his silence could be used as such should always be considered an 'improper compulsion'? According to the ECtHR, the right to silence and the privilege against self-incrimination are not absolute.

Although the ECtHR rarely provides general principles, it distinguished two generally applicable extremes with regard to the admissibility of the drawing of adverse inferences from a suspect's silence. On the one hand, it is obvious that a conviction cannot be based solely or mainly on a suspect's silence. On the other hand, however, in a situation that clearly calls for an explanation by the suspect, his silence can be taken into account when considering the persuasiveness of the prosecution's evidence.[184] It depends, however, on the particular circumstances of the case whether adverse inferences can legitimately be drawn from the suspect's silence. Such circumstances include how much weight is attached to the inferences by the court in assessing the evidence and the degree of compulsion in that particular situation. In light of the particular circumstances in *John Murray*, the ECtHR provided the following determinative factors:

- repeated warnings from the police or other authorities that inferences might be drawn from the suspect's silence can be considered as (indirect) compulsion, however, this factor is no longer decisive if the suspect was able to remain silent irrespective of such warnings;
- whether it is a jury or a professional judge drawing the inferences and deciding on the suspect's guilt, because only a professional judge has to explain why he has drawn adverse inferences from the suspect's silence;
- whether the proceedings contain sufficient procedural safeguards, such as appropriate warnings that inferences might be drawn and the assistance of a lawyer at the investigative phase;
- prosecution evidence should be consistent and sufficiently strong – independent from any inferences – to build a case to answer;
- drawing inferences should never shift the burden of proof from the prosecution to the suspect, in other words, the inferences should only be the last little 'push' to strengthen the judicial belief that the suspect is in fact guilty.[185]

[182] ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*), §§ 45-58; ECtHR 2 May 2000, ECLI:CE:ECHR:2000:0502JUD003571897 (*Condron/UK*), § 60.
[183] ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*).
[184] ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*), § 47.
[185] ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*), §§ 45-58.

In sum, the right to silence and the privilege against self-incrimination are not absolute and inferences may be drawn from the suspect's silence when the suspect is able to remain silent throughout the entire proceedings, despite strong prosecution evidence which requires an answer from the suspect and repeated warnings that inferences might be drawn from his silence, provided that sufficient procedural safeguards are in place.

The circumstances in *John Murray*, however, did not move the ECtHR to also shed some light on the situation where the suspect first invoked his right to silence, and then decided to provide evidence later in the proceedings. In such circumstances, inferences might still be drawn from his earlier silence. Moreover, the ECtHR did not address the fact that Murray had no legal assistance during the investigative phase. The fact that Murray remained silent throughout the entire proceedings is quite exceptional, especially without any legal assistance. In *Condron*[186] the complainant was assisted by a lawyer during police interrogation. According to the ECtHR, this gives a new dimension to the question whether adverse inferences can be drawn from a suspect's silence:

> "[…] the very fact that an accused is advised by his lawyer to maintain his silence must also be given appropriate weight by the domestic court. There may be good reason why such advice may be given."[187]

In more recent case law, the ECtHR has frequently emphasised the importance of the presence of counsel during the first stages of the criminal process, especially prior to and during police interrogation by linking the right to remain silent and the privilege against self-incrimination to the right to legal assistance.[188] In general, the ECtHR finds it important to counterbalance the vulnerable position of the suspect during the investigative phase by ensuring the right to legal assistance, also at this phase of criminal proceedings.[189]

The position of the criminal defence lawyer in this matter is complicated, because his advice on the defence strategy and on silence in particular might later turn against the accused, although at the time this advice might have been completely legitimate. According to the ECtHR, there may be good reasons to advise silence. However, the next question then is who determines whether the reasons for the advice were 'good'? Is it the judge deciding on the accused's case? Is it the criminal defence lawyer himself?

---

[186] ECtHR 2 May 2000, ECLI:CE:ECHR:2000:0502JUD003571897 (*Condron/UK*).
[187] ECtHR 2 May 2000, ECLI:CE:ECHR:2000:0502JUD003571897 (*Condron/UK*), § 60.
[188] See for example ECtHR 24 September 2009, ECLI:CE:ECHR:2009:0924JUD000702504 (*Pishchalnikov/Russia*), § 69.
[189] See for example ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), § 54.

2.3 The Criminal Defence Lawyer as Trusted Counsellor: the Right to Confidential Communication

The deontological principle of confidentiality and the related legal concept of legal professional privilege are key to the rule of law:[190] confidential communication between a criminal defence lawyer and his client is essential for the effective exercise of the rights of the defence.[191] The right to have confidential communication with one's lawyer is closely linked to the right to privacy, which is laid down in EU Directive 2013/48, the ECHR and the EU Charter.[192] Judicial authorities and the police should respect the confidential character of communications between suspects and their lawyers as long as these communications are related to the legitimate exercise of the right to access a lawyer.[193]

From the perspective of the criminal defence lawyer the deontological concept of confidentiality is approached as a professional duty. In order to fulfil this duty of confidentiality, the defence lawyer can invoke legal professional privilege when confronted with questions from the police or judicial authorities about the legal assistance he is offering to a specific client. On the basis of legal professional privilege he is not obliged to answer any questions, which might lead to disclosure of privileged material. Moreover, legal professional privilege protects privileged information when the lawyer's premises are searched and when other investigative measures, such as telephone tapping, are taken against the lawyer. Legal professional privilege is only explicitly protected in the EU Charter; in the individual Member States it exists as a fundamental principle of professional ethics.[194]

Confidentiality and legal professional privilege are not absolute. Exceptions can be made, but only if there is a profound, explicit and precise legal a basis for making an exception[195] and if the restriction serves the public interest.[196] This follows from Article 8 § 2 ECHR, which

[190] See for example Art. 4.2 Irish Code of Conduct for Solicitors: "Legal professional privilege is a fundamental feature of the administration of justice and the rule of law."; EU Directive 2013/48, recital 33; ECtHR 25 March 1992, ECLI:CE:ECHR:1992:0325JUD001359088 (*Campbell/UK*), § 46; ECtHR 6 December 2012, ECLI:CE:ECHR:2012:1206JUD001232311 (*Michaud/France*), § 123.

[191] See for example: Opinion of Advocate General Poiares Maduro, 14 December 2006, C-305/05, ECLI:EU:C:2006:788 (*Ordre des barreaux francophones et germanophone et al. v Conseil des Ministres*), §§ 1 and 36; ECtHR 25 March 1992, ECLI:CE:ECHR:1992:0325JUD001359088 (*Campbell/UK*); EU Directive 2013/48, recital 33.

[192] It could also be argued that confidentiality and legal professional privilege is an essential condition for effective exercise of the principle against self-incrimination and the right to silence, as enshrined in Article 6 ECHR. See: Spronken & Fermon 2009, pp. 446-447. This paragraph focuses on the protection offered by Article 8 ECHR.

[193] EU Directive 2013/48, recital 33.

[194] Opinion of Advocate General Léger, 10 July 2001, C-309/99, ECLI:EU:C:2001:390 (*Wouters and Others/Algemene Raad van de Nederlandse Orde van Advocaten*), § 182.

[195] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), § 72.

[196] CJEU 26 June 2007, C-305/05, ECLI:EU:C:2007:383 (*Ordre des barreaux francophones et germanophone et al./Conseil des Ministres*), § 36.

allows interference with the right to privacy under certain strict conditions. It is important to emphasise that confidentiality and privilege only concern material which is obtained in the course of the legitimate exercise of the lawyer's professional duties. The question that arises in this context is what is to be considered the 'exercise of the lawyer's professional duties' and also who is to decide which matters are connected to the lawyer's work and therefore covered by confidentiality and professional privilege.[197]

Several other deontological issues can be identified when it concerns the principle of confidentiality and professional privilege. First, what makes lawyer-client communication confidential? Is there a difference and, if so, what is the difference between confidential communication and privileged communication? Is all communication between the lawyer and his client privileged and, if not, what are the criteria for the determination that it concerns privileged communication? Second, secret surveillance, particularly telephone tapping, is a common investigative method used throughout the Member States. What are the precautions taken by authorities to ensure the privileged character of lawyer-client communications when the suspect is under surveillance? And more importantly within the framework of this research: which, if at all, deontological regulations can be distinguished about the expectations from criminal defence lawyers to ensure confidentiality of lawyer-client communications? Along the same lines it will be interesting to research what the deontological regulations, if any, are concerning the situation when the defence lawyer's premises are searched and documents and other evidentiary material are seized. For example, who determines whether the material is privileged? And what are the procedures if privileged material has to be seized within the framework of the criminal investigation? Third, and this concerns the relationship between criminal defence lawyer and his client: how should the lawyer deal with the situation that his client insists on making certain confidential information public? This also touches upon the question of who is *dominus litis* of the defence. In the following paragraphs elements of the normative framework concerning the duty of confidentiality and the right to legal professional privilege are set out.

2.3.1 Relevant Regulations

Recitals 33 and 34 of EU Directive 2013/48 read:

> "(33) Confidentiality of communication between suspects or accused persons and their lawyer is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between

[197] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), § 73.

> the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation. This Directive is without prejudice to procedures that address the situation where there are objective and factual circumstances giving rise to the suspicion that the lawyer is involved with the suspect or accused person in a criminal offence. Any criminal activity on the part of a lawyer should not be considered to be legitimate assistance to suspects or accused persons within the framework of this Directive. The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality. This is without prejudice to any mechanisms that are in place in detention facilities with the purpose of avoiding illicit enclosures being sent to detainees, such as screening correspondence, provided that such mechanisms do not allow the competent authorities to read the communication between suspects or accused persons and their lawyer. This Directive is also without prejudice to procedures under national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.
> (34) This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation by competent authorities. This Directive should also be without prejudice to the work that is carried out, for example, by national intelligence services to safeguard national security in accordance with Article 4(2) of the Treaty on European Union (TEU) or that falls within the scope of Article 72 TFEU, pursuant to which Title V on an area of Freedom, Security and Justice must not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

Article 4 of EU Directive 2013/48 reads:

> "Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law."

Article 7 EU Charter reads:

> "Everyone has the right to respect for his or her private and family life, home and communications."

Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A non-binding, yet relevant and illustrative regulation is Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer.[198] According to Principle I(6) of this recommendation Member States should take all necessary measures to ensure:

> "[…] respect of the confidentiality of lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law."

2.3.2 Protection of Legal Professional Privilege under EU Law

Combating terrorism and the often related money laundering to finance terrorist activities is high on the EU's criminal justice agenda.[199] Intrusive investigative measures have to be deployed, sometimes even to the detriment of fundamental rights and freedoms such as the right to confidential lawyer-client communication. For example, lawyers can be obliged to inform the authorities of any unusual financial transactions or other suspicious activities relating to money laundering regarding their clients. This is of particular importance for this research since money laundering and terrorist financing are typically cross-border crimes. According to Directive 2005/60/EC,[200] legal advice and representation in legal proceedings is

[198] Adopted by the Committee of Ministers on 25 October 2000.
[199] European Agenda on Security: Paving the way towards a Security Union, 20 April 2016 (European Commission Press Release).
[200] Directive 2005/60/EU of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering an terrorist financing, OJ L(2005) 309/15.

covered by legal professional privilege, and therefore falls outside the scope of the duty to inform authorities of any unusual transactions.[201] These regulations are obviously without prejudice to the situation that the lawyer's services are explicitly provided within the framework of money laundering of terrorist financing or if the lawyer is himself involved in money laundering or terrorist financing.[202]

Since criminal defence lawyers mostly advise their clients within the context of criminal proceedings, which will usually involve appearance in court, the regulations concerning the duty to inform authorities of transactions do not apply to the criminal defence practice. With regard to the protection of confidentiality and professional privilege, EU Directive 2013/48 in particular is important. This Directive clearly states that Member States are expected to guarantee confidential communications between a lawyer and the suspect or accused person. At the same time this Directive emphasises that confidentiality and professional privilege are not absolute. Breaches of confidentiality and professional privilege are allowed, for example, if there are sufficient factual and objective circumstances leading to the suspicion that the lawyer is involved with his client in criminal activities or when a breach is absolutely necessary for safeguarding national security.[203]

2.3.3 Protection of Professional Privilege under Article 8 ECHR

Article 8 ECHR concerns the right to respect of one's private life and correspondence.[204] In *Niemietz* the ECtHR explicated whether the protection of Article 8 ECHR also applied to a

[201] See also: CJEU 26 June 2007, C-305/05, ECLI:EU:C:2007:383 (*Ordre des barreaux francophones et germanophone et al./Conseil des Ministres*), § 32.
[202] EU Directive 2005/60, recital 20.
[203] EU Directive 2013/48, recitals 33 and 34.
[204] The issue of an applicant's victim status regarding an alleged violation of Article 8 ECHR is excluded from the overview. For a comprehensive overview of the ECtHR's case law on this matter see ECtHR (GC) 4 December 2015, ECLI:CE:ECHR:2015:1204JUD004714306 (*Roman Zakharov/Russia*), §§ 164-172. In sum, it is the ECtHR's task to establish that "the secrecy of the surveillance measures does not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and of the Court." In order to do that, the Court will take into account (1) the scope of the legislation permitting secret surveillance and (2) the availability of remedies at a national level. The two extremes of the sliding scale to determine to what extent the applicant needs to show that he is potentially at risk of being subjected to secret surveillance are then formed by at the one side a "domestic system [that] does not afford an effective remedy to the person who suspects that he or she was subjected to secret surveillance" and on the other a system that provides effective remedies. If the first system applies, the applicant does not have to "demonstrate the existence of any risk that secret surveillance measures are applied to him", in the second system the applicant is only considered a victim if "he is able to show that, due to his personal situation, he is potentially at risk of being subjected to" secretive measures. (§ 171) This approach provides the ECtHR with "the requisite degree of flexibility to deal with a variety of situations which might arise in the context of secret surveillance, taking into account the particularities of the legal systems in the member States, namely the available

professional environment such as a law firm; in Niemietz's case it concerned a search and seizure in his office. [205] According to the Court what was decisive for the applicability of Article 8 ECtHR in *Niemietz* was that he – as a lawyer – practised a liberal profession. This means that professional and personal life often are very much intertwined: for example the lawyer can conduct his profession from his law firm as well as from his home, making it very difficult to clearly distinguish between his personal and professional affairs. A narrow interpretation of the words 'home' and 'domicile' would thus actually be counterproductive to the aim of Article 8 ECHR. [206] As such Article 8 ECHR also applies to lawyers in the exercise of their profession.

As mentioned before, the right to privacy is not absolute. Interference, for example by investigative measures, such as the use of covert surveillance, is allowed under certain strict conditions. These conditions are articulated in Article 8 § 2 ECHR. The interference has to be "in accordance with the law", serve a legitimate purpose, and be "necessary in a democratic society". With regard to the first condition, the ECtHR requires that the measure interfering with the right to privacy has some basis in domestic law. This legislation has to be accessible, foreseeable and compatible with the rule of law. [207] The 'quality of the legislation' is assessed by the preciseness of its wording [208] and the application of the law in practice. [209] The requirement of foreseeability is an important safeguard against arbitrary use of the measures. At the same time, most of the measures, such as covert surveillance are only effective due to the fact that it is unforeseeable for the person under surveillance. The covert and unforeseeable character of the surveillance therefore makes it prone to arbitrary use. Essentially, the ECtHR requires that the more prone to arbitrary use measures are, the more precise the law has to be in order for the use of these measures to be compatible with the rule of law. [210]

---

remedies, as well as the different personal situations of applicants." (§ 172) See also ECtHR 22 May 2008, ECLI:CE:ECHR:2008:0522JUD006575501 (*Iliya Stefanov/Bulgaria*): the mere fact that the applicant complained about disturbances on his telephone line and the fact that domestic legislation expressly prohibits disclosure of information about secret surveillance to the person concerned is not sufficient to establish victim status. In the particular case of Iliya Stefanov these circumstances, the categorical denial of the Government that the applicant had been subjected to telephone tapping and the fact that no documents were found in the case file relating to surveillance measures made the complaint manifestly ill-founded. (§ 51)

[205] ECtHR 16 December 1992, ECLI:CE:ECHR:1992:1216JUD001371088 (*Niemietz/Germany*).

[206] ECtHR 16 December 1992, ECLI:CE:ECHR:1992:1216JUD001371088 (*Niemietz/Germany*), §§ 29-31.

[207] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), § 55.

[208] See for example ECtHR (GC) 4 May 2000, ECLI:CE:ECHR:2000:0504JUD002834195 (*Rotaru/Romania*), § 56.

[209] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), §§ 73-75.

[210] ECtHR 2 August 1984, ECLI:CE:ECHR:1984:0802JUD000869179 (*Malone/UK*), §§ 67-68; ECtHR 25 June 1997, ECLI:CE:ECHR:1997:0625JUD002060592 (*Halford/UK*), § 49: "In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to

Secondly, when it is established that the interference is in accordance with the law, it has to be determined whether the interference served a legitimate purpose. A legitimate purpose is for example the protection of national security or the prevention of disorder and crime.[211] Judge Wildhaber emphasised in his concurring opinion to the decision of the Court in *Rotaru* that there should at least be a "reasonable and genuine link between the aim invoked and the measures interfering with private life".[212]

Thirdly, the interference has to be necessary in a democratic society, which is closely linked to the legitimate purpose. In order for the interference to be necessary in a democratic society the ECtHR has to be satisfied that there are adequate and effective guarantees against abuse. It is difficult to provide general benchmarks, because this assessment is very much dependent on all circumstances of the case.[213] For example, the absence of judicial supervision over the imposed measure of secret surveillance may constitute a violation of Article 8 ECHR.[214]

In *Schönenberger and Durmaz*[215] the ECtHR found that Article 8 ECHR had been violated, because the prosecution had stopped a letter from Schönenberger, a lawyer, to his detained client, Durmaz, in which he advised Durmaz to invoke his right to silence. The Government

---

the individual against arbitrary interference with Article 8 rights (art. 8). Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures."

[211] ECtHR 18 May 2010, ECLI:CE:ECHR:2010:0518JUD002683905 (*Kennedy/UK*), § 155.

[212] ECtHR (GC) 4 May 2000, ECLI:CE:ECHR:2000:0504JUD002834195 (*Rotaru/Romania*), Concurring opinion of Judge Wildhaber joined by Judges Makarczyk, Türmen, Costa, Tulkens, Casadevall and Weber: "As regards the legitimate aim, the Court has regularly been prepared to accept that the purpose identified by the Government is legitimate provided it falls within one of the categories set out in paragraph 2 of Articles 8 to 11. However, in my view, in respect of national security as in respect of other purposes, there has to be at least a reasonable and genuine link between the aim invoked and the measures interfering with private life for the aim to be regarded as legitimate. To refer to the more or less indiscriminate storing of information relating to the private lives of individuals in terms of pursuing a legitimate national security concern is, to my mind, evidently problematic."

[213] ECtHR 6 September 1978, ECLI:CE:ECHR:1978:0906JUD000502971 (*Klass and others/Germany*), § 50: circumstances include the nature, scope and duration of the measures, the grounds required to order such measures, the authorities permitting, carrying out and supervising the measures and the remedies for the persons subjected to the measures.

[214] See for example ECtHR 6 September 1978, ECLI:CE:ECHR:1978:0906JUD000502971 (*Klass and others/Germany*), § 55; ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), § 74; ECtHR (GC) 4 May 2000, ECLI:CE:ECHR:2000:0504JUD002834195 (*Rotaru/Romania*), § 60. See also ECtHR 24 October 2006, ECLI:CE:ECHR:2006:1024JUD007084501 (*Taner Kiliç/Turkey*)regarding specific authorization needed for search warrants in law offices; ECtHR 15 February 2011, ECLI:CE:ECHR:2011:0215JUD005672009 (*Heino/Finland*) regarding the lack of effective access to a court to have both the lawfulness of, and justification for, the search warrant reviewed a posteriori.

[215] ECtHR 20 June 1988, ECLI:CE:ECHR:1988:0620JUD001136885 (*Schönenberger and Durmaz/Switzerland*).

argued that the letter was stopped to prevent disorder or crime.[216] The Court was not convinced and considered that by stopping the letter, Durmaz was deprived of effective legal assistance and the possibility of exercising his rights under Article 6 ECHR. As such, the interference in the lawyer-client correspondence was unjustifiable as "necessary in a democratic society".[217]

When the criteria of Article 8 § 2 ECHR have to be applied to surveillance of privileged lawyer-client communications these criteria are even stricter.[218] According to standing ECtHR case law, Article 8 offers "strengthened protection" to lawyer-client communications, because it is recognised that a lawyer will not be able to defend his client properly if he is unable to guarantee the confidential character of their communications, which in turn will undermine the accused's right to a fair trial, including his right not to incriminate himself.[219] In the following two paragraphs, two specific situations relating to Article 8 ECHR are further analysed: the covert surveillance of privileged lawyer-client communications and search and seizure measures regarding lawyers' premises.

2.3.4 Covert Surveillance of Confidential Lawyer-Client Communication

Lawyers and clients use a variety of channels of communication, but communication via telephone, e-mail, and face-to-face communication in detention facilities are particularly prone to being subjected to (covert) surveillance measures.[220] In *Kopp v. Switzerland*,[221] the applicant filed a complaint with the ECtHR stating that his right to privacy was violated, since his personal and professional telephone lines were subjected to covert surveillance and by doing so also privileged communication was recorded, while Kopp himself was not a suspect in the matter. Kopp was a practising lawyer, when his wife came under the suspicion of disclosing official secrets obtained in her capacity as member of the Federal Council and head of the Federal Department of Justice and Police. In the course of criminal investigations

[216] ECtHR 20 June 1988, ECLI:CE:ECHR:1988:0620JUD001136885 (*Schönenberger and Durmaz/Switzerland*), § 25.
[217] ECtHR 20 June 1988, ECLI:CE:ECHR:1988:0620JUD001136885 (*Schönenberger and Durmaz/Switzerland*), §§ 29-30.
[218] See for example ECtHR 27 October 2015, ECLI:CE:ECHR:2015:1027JUD006249811 (*R.E./UK*), § 159. This case clearly distinguishes between consultations between lawyers and their clients, which are protected by legal privilege and communications between vulnerable suspects and an appropriate adult, which are not covered by professional privilege. The regulations applicable to both types of communications are compatible with Article 8 ECHR in the latter, but not in the former instance, which emphasises once more that the assessment when it concerns privileged lawyer-client communication is bound to stricter safeguards.
[219] ECtHR 6 December 2012, ECLI:CE:ECHR:2012:1206JUD001232311 (*Michaud/France*), § 118.
[220] See Blackstock et al. 2014, p. 16-17.
[221] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*).

against his wife, Kopp's private and professional telephone lines were monitored for less than a month (not as a suspect, but as a third party). Lastly, no evidence could be found supporting the allegations against Kopp's wife and she was acquitted. Consequently, Kopp was informed by the prosecutor's office that his telephone lines had been tapped from 21 November to 11 December 1989, but that conversations which he had conducted as a lawyer had not been monitored. Kopp filed administrative complaints of unlawful telephone tapping with the Federal Council and the Federal Court. His complaints were dismissed on the grounds that Kopp was not tapped as a suspect, but as a 'third party' in accordance with domestic regulations. Moreover, the professional conversations he had had during the period in which his telephone lines were tapped were expressly excluded from monitoring according to the warrant. Kopp then turned to the ECtHR submitting that the interception of his telephone communications violated his rights under Article 8 ECHR.

It was not disputed among the parties that Article 8 ECHR applied to the present case. The relevant question in this case was whether there had been an interference and consequently whether this interference was justified. The ECtHR considered that in *Kopp*'s case Article 8 ECHR had been violated, despite the fact that none of the recorded conversations involving Kopp had been brought to the knowledge of the prosecution, that all recordings had been destroyed and no use had been made of any of the recordings.[222] The next question then was whether this interference was justified. The Court considered that although there was a legal basis in Swiss law for the impugned measure and this legislation clearly intended to protect professional secrecy concerning lawyer-client communications,[223] the practice followed in the present case led to a violation of Article 8 ECHR. Firstly, the Court was not persuaded by the Government's arguments that Kopp had not been tapped in his capacity as a lawyer, indeed Kopp was a lawyer and all his law firm's telephone lines were monitored. Secondly, interception of telephone communications constitutes a serious interference in private life and correspondence, therefore it must be based on particularly precise regulations. In that regard, the Court paid specific attention to procedural safeguards such as the authority approving the telephone-tapping order and the fact that Kopp was informed that his telephone lines had been tapped. Although, in *Kopp* these safeguards, in theory, were well accounted for in legislation, in practice the task to decide whether monitored conversations were covered by professional privilege was assigned to an official of the Post Office's legal department without supervision of an independent judge. Apparently, legislation allowed for a delegation of the authority to members of the executive branch so that the law did not "indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter".[224] In conclusion,

[222] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), §§ 51-53.
[223] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), § 68.
[224] ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*), § 74.

the way in which the legislation was put into practice in *Kopp* led to a violation of Article 8 ECHR because the interference was not in accordance with the protection required by the rule of law.

Moreover, the level of interference with respect for an individual's private life determines the desired level of procedural safeguards. Since the technology used for the interception of communications is becoming increasingly sophisticated, precise and sufficiently clear legislation and application in practice is needed to afford individuals proper protection against arbitrary use of these technologies. According to the ECtHR, the level of protection needed does not depend on the technical definition of the interference, but on the level of interference with respect for an individual's private life. The more intrusive the measure, the stricter the standards have to be to ensure protection against arbitrary interference.[225] For example, the use of GPS tracking of an individual's movement in public places as a way of covert surveillance is considered much less intrusive on one's private life than telephone tapping, so that more lenient standards suffice.[226] Another example is covert surveillance of lawyer-client consultations in police stations or detention centres, which according to the ECtHR "constitutes an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence".[227]

Although the level of procedural safeguards thus depends on the intrusiveness of the interference of a person's right to privacy, standing ECtHR case law shows that there are some minimum safeguards that have to be set out in statutory law to avoid any abuse of these covert surveillance measures. These safeguards include:

> "[…] the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed."[228]

An important procedural safeguard against arbitrary use of secret surveillance measures is independent supervision. According to standing case law of the ECtHR, this supervision does not necessarily have to be judicial control, but the supervisor has to be authorised to

[225] ECtHR 27 October 2015, ECLI:CE:ECHR:2015:1027JUD006249811 (*R.E./UK*), § 130.
[226] ECtHR 2 September 2010, ECLI:CE:ECHR:2010:0902JUD003562305 (*Uzun/Germany*), § 66.
[227] ECtHR 27 October 2015, ECLI:CE:ECHR:2015:1027JUD006249811 (*R.E./UK*), § 131.
[228] ECtHR 18 May 2010, ECLI:CE:ECHR:2010:0518JUD002683905 (*Kennedy/UK*), § 152 including references to earlier case law. See also ECtHR (GC) 4 December 2015, ECLI:CE:ECHR:2015:1204JUD004714306 (*Roman Zakharov/Russia*), § 227 et seq. for a comprehensive overview of ECtHR case law on the interception of telephone communication.

independently assess the exercise of the measures and in the event be qualified to quash any interception order or order the destruction of intercepted material.[229]

2.3.5 Search and Seizure at Lawyer's Premises

In the previous paragraph procedural safeguards as a counterbalance to intrusive covert surveillance of lawyer-client communication were discussed. This paragraph will focus on another investigative measure, namely search and seizure. In principle, law firms are not immune to searches and seizures. However, given the strengthened protection of Article 8 ECHR when it concerns lawyer-client communication, search and seizure at a lawyer's premises can only be legitimately carried out when the necessary procedural safeguards are taken into account. In the leading case of *Niemietz v. Germany* the ECtHR ruled that the search of Niemietz's office (Niemietz was a lawyer at the time):

> "[…] impinged on professional secrecy to an extent that appears disproportionate in the circumstances; it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention. In addition, the attendant publicity must have been capable of affecting adversely the applicant's professional reputation, in the eyes both of his existing clients and of the public at large."[230]

The ECtHR emphasised that special procedural safeguards, such as having an independent observer present during the search, were absent in the domestic regulation on searches as had been carried out on Niemietz's premises. In *Niemietz* the ECtHR therefore held unanimously that Article 8 ECHR had been violated.

The requirement to have an independent observer present has been repeatedly addressed by the ECtHR in subsequent case law. In *Petri Sallinen and Others v. Finland*[231] a fellow member of the Bar assisted the applicant during part of the search and seizure of his law firm. During the search clients files, floppy disks and notebooks containing notes about client meetings were thoroughly inspected, hard disks of office computers were copied and

[229] See for example ECtHR 18 May 2010, ECLI:CE:ECHR:2010:0518JUD002683905 (*Kennedy/UK*), § 167; ECtHR 29 June 2006, ECLI:CE:ECHR:2006:0629DEC005493400 (*Weber and Saravia/Germany*), § 106; ECtHR 22 November 2012, ECLI:CE:ECHR:2012:1122JUD003931506 (*Telegraaf Media Nederland landelijke media B.V. and others/the Netherlands*), § 98. It should be noted that in *Telegraaf* it concerned the surveillance of journalist and not lawyers. However, also in this case the ECtHR ruled that surveillance had to be subjected to independent supervision.

[230] ECtHR 16 December 1992, ECLI:CE:ECHR:1992:1216JUD001371088 (*Niemietz/Germany*), § 37.

[231] ECtHR 27 september 2005, ECLI:CE:ECHR:2005:0927JUD005088299 (*Petri Sallinen and Others/Finland*).

two computers, including the applicant's computer containing personal and professional correspondence, were seized. As such, the search and seizure were quite extensive and the Court attached great importance to the fact that no independent or judicial supervision was present during these actions. Therefore, the Court held unanimously that Article 8 ECHR had been violated. At the same time it should be noted that judicial review is not in itself a sufficient safeguard against arbitrary use of authority to search. The Court should examine all circumstances of the case in order to assess whether protection against arbitrary interference has been adequate.[232]

One of those circumstances is the wording of the search warrant. It should be precise enough to keep its impact within reasonable limits. Terms that are too broad might allow the investigators conducting the search and seizure too much or even unrestricted discretion. It depends very much on the specific circumstances of the case what is considered 'precise enough'. For example, the search of an entire law firm and seizure of all computers of all lawyers working at that firm in the course of criminal investigations regarding only one of the lawyers is considered to be in violation under Article 8 ECHR of the rights of the other lawyers.[233] In another case, which involved a suspicion of forgery, it had become clear to the investigating officer that the alleged forged document and the applications made by the lawyer in the criminal proceedings of his client might have been printed from the same device. Consequently, the lawyer's office was searched and two computers containing private and professional data, a printer, the lawyer's personal notebook and certain documents and business cards were seized. The copying device was voluntarily handed over by the lawyer, but the terms of the search warrant were so broad that the investigators also took the opportunity to seize many other items and documents. This, and the fact that there were no safeguards in place against interference with professional secrecy, such as having an independent and knowledgeable observer present, led to finding that Article 8 ECHR had been violated.[234]

It has already been set out in the previous paragraphs that interference with respect for person's private life is justified if the interference was "necessary in a democratic society". According to standing ECtHR case law, the Court will have to assess whether there were relevant and sufficient reasons to order the search, and the Court will have to verify whether there were effective safeguards against abuse of the investigative measure in place. Since search and seizure is quite an intrusive investigative measure, its use has to be proportionate to the aim pursued. For example, the Court will have to determine whether there was other

[232] ECtHR 22 May 2008, ECLI:CE:ECHR:2008:0522JUD006575501 (*Iliya Stefanov/Bulgaria*), § 39.
[233] ECtHR 12 February 2015, ECLI:CE:ECHR:2015:0212JUD000567806 (*Yuditskaya and others/Russia*): "The Court […] considers that the search warrant was couched in very broad terms, giving the investigators unrestricted discretion in the conduct of the search. It did not explain why it would not be sufficient to search only the office and the computer used by I.T." (§ 29)
[234] ECtHR 9 July 2009, ECLI:CE:ECHR:2009:0409JUD001985604 (*Kolesnichenko/Russia*).

evidence available, what the content and scope of the search warrant is, and whether independent observers were present during the search.[235]

In *Smirnov v. Russia,*[236] prior judicial authorisation of the search warrant was absent, but this absence was counterbalanced by the fact that ex post factum judicial review was available and also used by the applicant. The Court, however, observed that the original search warrant lacked fundamental information about the ongoing investigation and the reasons why it was believed the search would enable relevant evidence to be obtained. This also afforded the police unrestricted discretion in determining which documents were to be seized in the interest of criminal investigations. Since the ex post factum judicial review could not fill these lacunae the Court found that the authorities failed to provide "relevant and sufficient" reasons to justify the search warrant. Lastly, the fact that the applicant was not a suspect, but legal representative of the accused in the criminal case for which the search was carried out, also played an important role in the Court unanimously holding that Article 8 ECHR had been violated.[237]

In *Wieser and Bicos Beteiligungen GmbH v. Austria,*[238] the ECtHR also held unanimously that Article 8 ECHR had been violated in respect of Mr Wieser. The focus in this case was on the fact that the necessary procedural safeguards were applied to the seizure of documents in hardcopy, but those same safeguards should have been observed when seizing electronic data (the applicant's computer was searched by the authorities and files were copied). Although a member of the Austrian Bar Association was present during the search and also informed by the authorities of the data search in the applicant's computer, he was primarily busy supervising the seizure of documents in hardcopy, so that the officers collecting electronic data were virtually unsupervised. After finishing the search, the officers left without drawing up a search report and without informing Mr Wieser about the results of the search. Only later that day was a report drafted. The Court observed that the manner in which the search and seizure were carried out with regard to electronic data "incurred the risk of impinging on his right to professional secrecy".[239]

Robathin v. Austria[240] illustrates even more how strict the requirements are to ensure sufficient and effective safeguards and supervision in case the search and seizure involves a lawyer's premises. Robathin, a practising lawyer by profession, was himself suspected of aggravated theft regarding person R and aggravated fraud and embezzlement regarding

---

[235] ECtHR 12 November 2007, ECLI:CE:ECHR:2007:0607JUD007136201 (*Smirnov/Russia*), § 44 (including references to relevant case law).
[236] ECtHR 12 November 2007, ECLI:CE:ECHR:2007:0607JUD007136201 (*Smirnov/Russia*).
[237] ECtHR 12 November 2007, ECLI:CE:ECHR:2007:0607JUD007136201 (*Smirnov/Russia*), §§ 45-49.
[238] ECtHR 16 October 2007, ECLI:CE:ECHR:2007:1016JUD007433601 (*Wieser and Bicos Beteiligungen GmbH/Austria*).
[239] ECtHR 16 October 2007, ECLI:CE:ECHR:2007:1016JUD007433601 (*Wieser and Bicos Beteiligungen GmbH/Austria*), § 65.
[240] ECtHR 3 October 2012, ECLI:CE:ECHR:2012:0703JUD003045706 (*Robathin/Austria*).

person G. In the course of criminal investigations against Robathin his professional premises were searched. During these searches, Robathin, his defence counsel, and a representative of the Vienna Bar Association were present. During the search, all files on Robathin's computer were copied, despite the opposition of the Bar's representative. Eventually, the material was stored on multiple discs, containing material on one disc that was directly related to the suspicions and the rest of the material on several other discs. All discs were sealed. The discs were handed over to the investigating judge, and according to domestic legislation, the Review Chamber of the Regional Criminal Court was called upon to decide whether the material could be examined. The Review Chamber authorised examination of all materials. Robathin turned to the ECtHR complaining that his rights under Article 8 ECHR had been violated by the search and seizure of all his electronic data. The ECtHR considered that although all necessary safeguards had been taken into account, the search warrant was couched in terms that were too broad and the way in which the Review Chamber exercised its supervision of the search warrant was too brief and general to be able to effectively scrutinise whether the search of all electronic data was necessary and proportionate in the case. Because particular reasons to search all data were lacking, the Court found that Article 8 ECHR had been violated. Interestingly, this decision was not unanimous. The two dissenting judges were of the opinion that the case differed significantly from *Wieser and Bicos Beteiligungen GmbH*, because in Robathin's case, all procedural safeguards were complied with. Moreover, Robathin was himself a suspect, which in the opinion of the dissenting judges allowed for a more elaborate search and seizure so that it was not disproportionate to seize all electronic data. Therefore the dissenting judges concluded that a finding of no violation of Article 8 ECHR would have been more appropriate.

The presence of an observer during a search of a lawyer's premises as a safeguard against arbitrary use of investigative powers is highly unlikely to be effective, if the observer is not legally qualified[241] or not explicitly appointed to defend the interests of the person who is subjected to the search.[242] This is particularly relevant when the search leads to an indiscriminate seizure of computers, monitors, printers and floppy discs, which material was only days after the seizure sifted through by an expert for relevant data, so that the person concerned is unable to check whether the material has not been inspected or copied in the meantime.

Lastly, it should be noted that the importance attached by the ECtHR to safeguarding professional secrecy in many instances is a consequence of the right of the lawyer's client not to incriminate himself enshrined in Article 6 ECHR. The ECtHR has consistently held that

[241] ECtHR 22 May 2008, ECLI:CE:ECHR:2008:0522JUD006575501 (*Iliya Stefanov/Bulgaria*), §§ 42-43; ECtHR 5 July 2012, ECLI:CE:ECHR:2012:0705JUD004171606 (*Golovan/Ukraine*), §§ 62-64.
[242] ECtHR 6 July 2010, ECLI:CE:ECHR:2010:0706JUD003306805 (*Turan/Hungary*), § 21.

evidence against an accused person should not be obtained through 'fishing expeditions'.[243] This also explains why search warrants have to precisely describe the reasons why the search and seizure is conducted and the material to which it applies. A search and seizure which is primarily aimed at collecting evidence establishing the existence of alleged offences, when the defence lawyer himself is not a suspect in the criminal proceedings, is not only in violation of his rights under Article 8 ECHR, but also in violation of the client's rights under Article 6 ECHR.[244]

2.4 The Criminal Defence Lawyer as Spokesperson: The Right to Freedom of Expression

The role of the criminal defence lawyer as spokesperson is primarily noticeable when the criminal defence lawyer makes comments to the media about a case he is currently conducting and when he has to defend the accused in open court. The right to freedom of expression, as laid down in *inter alia* Article 10 ECHR, is an important tool for the criminal defence lawyer to properly carry out this role as spokesperson.[245] The freedom of expression is, however, not absolute and may be subject to certain restrictions or conditions. For example, according to the ECtHR the State has a positive obligation to control media conduct to ensure a fair trial, which is closely linked to the presumption of innocence. Indeed, prejudicial publicity might influence judges and perhaps even more so jurors in their judgment.[246] Criminal defence lawyers should be aware of the serious impact the media can have on their client's case, which can be beneficial for his case or, conversely, detrimental to his case. The framework provided by European regulations and case law are outlined in this paragraph. Questions that arise include: to what extent is the criminal defence lawyer allowed to criticise the prosecutor's or judge's conduct? Can the criminal defence lawyer say anything in his client's defence when he appears in the media, if he is allowed to make comments to the media at all?

[243] ECtHR 25 February 1993, ECLI:CE:ECHR:1993:0225JUD001082884 (*Funke/France*); ECtHR 3 May 2001, ECLI:CE:ECHR:2001:0503JUD003182796 (*J.B./Switzerland*).
[244] ECtHR 7 January 2009, ECLI:CE:ECHR:2008:1007JUD003306604 (*Mancevschi/Moldova*); ECtHR 24 July 2008, ECLI:CE:ECHR:2008:0724JUD001860303 (*André and another/France*).
[245] See also Recommendation No. R(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyers, Principle I(3): "Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and suggest legislative reforms."
[246] See Harris, O'Boyle & Warbrick 2014, p. 466-467.

2.4.1 Relevant Regulations

The freedom of expression is set out in Article 10 ECHR:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The right to freedom of expression is also set out in Article 11 § 1 EU Charter:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

2.4.2 Freedom of Expression in the Courtroom

It is the criminal defence lawyer's duty to represent the accused in court and according to standing ECtHR case law governments should not interfere too much in how the lawyer conducts the defence. Only when the lawyer is appointed to represent the accused on the basis of legal aid and clearly neglects his professional duties, is the Government obliged to step in.[247] A free and forceful exchange of arguments between parties in criminal proceedings should be the norm, given the principle of equality of arms.[248] This means that the lawyer should be free to criticise criminal proceedings and the role of the prosecution and the judiciary; however, there are limitations to the lawyer's freedom of expression.

The criminal defence lawyer acts as an intermediary between the State and the accused, with professional obligations on both sides. This gives the criminal defence lawyer a special

[247] Spronken 2001, pp. 463-467.
[248] ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*), § 49.

status and may restrict his conduct to a certain extent.[249] According to standing ECtHR case law lawyers are "entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds".[250] Various interests have to be balanced, such as the right of the public to be informed, the proper administration of justice and the dignity of the legal profession. The Government has quite a wide margin of appreciation in determining whether the lawyer's criticism is acceptable, and if necessary may restrict the lawyer's conduct. These restrictions should, however, always be proportionate and be "relevant and sufficient".[251] Whether an interference in the lawyer's freedom of expression is justified very much depends on the exact wording of the criticism, the context in which the criticism occurred, and the 'arena' (meaning the media or the courtroom) in which the criminal defence lawyer expressed his criticism.

For example, stating that the public prosecutor has drafted the indictment clearly in "a state of complete intoxication"[252] or calling the judge's view "ridiculous" when in fact the judge's opinion is legally correct[253] or stating that the authorities are "playing tricks" on the client[254] is intolerable. Article 10 ECHR allows restrictions of criminal defence lawyers' freedom of expression on two conditions.[255] First, the interests of the criminal defence lawyer to defend his client's case fearlessly and the interests of the authorities to have their reputation respected must be properly and thoroughly balanced. Second, the relevant facts must be adequately assessed to verify whether the statements made by the defence lawyer can be justified in light of the legitimate defence of his client's interests.

---

[249] ECtHR 20 May 1998, ECLI:CE:ECHR:1998:0520JUD002540594 (*Schöpfer/Switzerland*), § 29 (with further references); ECtHR (GC) 11 September 2013, ECLI:CE:ECHR:2015:0423JUD002936910 (*Morice/France*), § 100.

[250] ECtHR 20 May 1998, ECLI:CE:ECHR:1998:0520JUD002540594 (*Schöpfer/Switzerland*), § 33. See also: ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*); ECtHR 28 October 2003, ECLI:CE:ECHR:2003:1028JUD003965798 (*Steur/the Netherlands*); ECtHR 20 April 2004, ECLI:CE:ECHR:2004:0420JUD006011500 (*Amihalachioaie/Moldavia*); ECtHR 30 November 2006, ECLI:CE:ECHR:2006:1130JUD001080704 (*Veraart/the Netherlands*); ECtHR 24 January 2008, ECLI:CE:ECHR:2008:0124DEC001715503 (*Coutant/France*); ECtHR 17 July 2008, ECLI:CE:ECHR:2008:0717JUD000051305 (*Schmidt/Austria*); ECtHR 15 December 2002, ECLI:CE:ECHR:2011:1215JUD002819809 (*Mor/France*); ECtHR (GC) 11 September 2013, ECLI:CE:ECHR:2015:0423JUD002936910 (*Morice/France*).

[251] ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*), § 44.

[252] ECmHR 14 January 1998, ECLI:CE:ECHR:1998:0114DEC002904595 (*Mahler/Germany*).

[253] ECmHR 30 June 1997, ECLI:CE:ECHR:1999:1221JUD002660295 (*W.R./Austria*).

[254] ECtHR 17 July 2008, ECLI:CE:ECHR:2008:0717JUD000051305 (*Schmidt/Austria*).

[255] See also ECtHR 30 November 2006, ECLI:CE:ECHR:2006:1130JUD001080704 (*Veraart/the Netherlands*). In this case the ECtHR considered that the relevant interests in the case were not properly balanced and the relevant facts were not adequately assessed, so that it was impossible for the disciplinary courts "to give an informed decision as to whether the applicant had overstepped the limits of acceptable professional behaviour" (§ 61). Equally: ECtHR 28 October 2003, ECLI:CE:ECHR:2003:1028JUD003965798 (*Steur/the Netherlands*); see also: ECtHR 19 February 2015, ECLI:CE:ECHR:2015:0127DEC002922211 (*Fuchs/Germany*).

In *Schöpfer v. Switzerland,*[256] Schöpfer, who was a practising criminal lawyer at the time, had organised a press conference to express his criticism of the district authorities, that according to Schöpfer flagrantly disregarded human rights not only in the case of his client but also in general and had done so for years. He had made these comments to the media while his client's case was still pending before the court. Although Schöpfer claimed that the press conference was his last resort, he lodged an appeal after he made the statements in the media and his appeal was partly successful. This led the ECtHR to consider that Schöpfer should have first gone through the 'normal legal' route before holding a press conference. Moreover, in disciplinary proceedings following Schöpfer's conduct, only a small fine was imposed on him, which the ECtHR considered proportionate. Taking all these circumstances into account, Article 10 ECHR had not been violated.

In *Nikula v. Finland,*[257] Nikula criticised the prosecutor's conduct in the context of a specific case and only related to the professional and procedural conduct of this prosecutor in this case.[258] Different from Schöpfer, Nikula made her statements in court and not in public. In first instance Nikula was fined for her conduct, which was later overturned by the Supreme Court, but she was still obliged to pay damages and costs. In *Nikula*, the ECtHR found that Article 10 ECHR had been violated because the interference with Nikula's freedom of expression by the authorities failed to answer any 'pressing social need'.[259] Even more so, the threat of an ex post facto review of her criticism of the prosecutor could have a serious

[256] ECtHR 20 May 1998, ECLI:CE:ECHR:1998:0520JUD002540594 (*Schöpfer/Switzerland*).
[257] ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*).
[258] ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*), § 48: "The limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. It cannot be said, however, that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions. Civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks. It may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty".
[259] See also ECtHR 15 December 2015, ECLI:CE:ECHR:2015:1215JUD002902411 (*Bono/France*). When conducting the defence of his Syrian client who was suspected of participating in an international terrorist organization, *Bono* had criticised the judiciary of complicity in the torturing of his client by the Syrian secret service. During these proceedings the Court of Appeal had already made it clear to *Bono* that according to their standards his behaviour was out of line and misplaced. Still, the public prosecutor filed a disciplinary complaint based on the notion that his statements were a personal attack on the judiciary's integrity. Although the disciplinary court in first instance ruled that the complaint was unfounded the court of appeal reprimanded *Bono* and ordered that he could not be elected as member of any institution of the Bar for five years. Bono consequently appealed this decision in cassation, but the judgment of the Disciplinary Court of Appeal was upheld. Before the ECtHR *Bono* pleaded that his right to freedom of expression (Article 10 ECHR) was violated: disciplinary sanctions had no longer been necessary since the relevant courts had already addressed *Bono* and had made it clear that they found Bono's comments misplaced and unethical. The ECtHR followed Bono's plea and found that Article 10 ECHR had been violated.

chilling effect on Nikula's conduct and particularly her duty to act zealously in the interests of her client.[260] The manner in which authorities react to the impugned criticism thus also plays an important role in determining whether Article 10 ECHR was violated.

In *Rodriguez Ravelo v. Spain,*[261] the Court considered that although the applicant's conduct was disrespectful it should have been taken into account that he made his remarks in a letter specifically addressed to the judge concerned and therefore his criticism had a limited scope. Given the rather severe criminal sanction imposed on the applicant, the Court held that the applicant's right to freedom of expression was violated.

2.4.3 Making Comments to the Media: Preventing Trial by Media

Criminal cases, particularly the larger cases or cases which involve public figures, regularly attract media attention, so that it is not uncommon for criminal defence lawyers to comment on the case in the media. Moreover, we are currently living in an era of information. The media, including social media, is everywhere and available at all times. News facts reach us (almost) real time and the public also expects to be fed continuously with information.[262] The ECtHR considered the following about the relation between the right to freedom of the press and the right to a fair trial:

> "Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. This is all the more so where a public figure is involved, such as, in the present case, a former member of the Government. […] However, public figures are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6, which in criminal proceedings include the right to an impartial tribunal, on the same basis as every other person. This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice."[263]

Publishing about a case that is still *sub judice* might cause a 'trial by media', which could interfere with the accused persons's right to a fair trial. ECtHR case law on the freedom of expression with regard to the issue of 'trial by media' concerns complaints of journalists who

[260] ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*), § 54.
[261] ECtHR 12 January 2016, ECLI:CE:ECHR:2016:0112JUD004807410 (*Rodriguez Ravelo/Spain*).
[262] See Boksem 2013; Stevens 2010.
[263] ECtHR 29 August 1997, ECLI:CE:ECHR:1997:0829JUD002271493 (*Worm/Austria*), § 50.

argue that their right to a free press has been violated by courts or governments when they were not allowed to publish about certain judicial proceedings. According to standing ECtHR case law, the right to freedom of the press is not absolute. The right can be limited in light of the right to a fair trial and the presumption of innocence.[264] Moreover, freedom of the press should always serve a legitimate purpose, such as initiating a discussion about the principles of democracy and the rule of law.[265]

This research focuses on the role of criminal defence lawyers in this matter. Can, and if so, how should the media be used by lawyers in a manner beneficial for the defence? In this respect, it is important for the defence lawyer to realise that the image created by the media can be extremely powerful. Especially high-profile cases are often reported in the media with a certain sensationalism to arouse public indignation. The power of the media should not be underestimated. Moreover, judges and juries also read newspapers and it is questionable whether the news influences their judgment. In any case, it is inevitable that the judge will become more cautious when he knows that there is much media attention for the case he is dealing with. Not to mention the public pressure that goes with it.[266]

Also, criminal defence lawyers might be approached by the media to comment on the administration of justice in general. According to the ECtHR, lawyers should certainly be allowed to appear in public and comment on the administration of justice, although their criticism should observe its limitations:[267] the secrecy of pending judicial investigation needs to be respected, and statements should have a sound factual basis and not be insulting to the person to whom the statements apply. At the same time a lawyer cannot be held responsible for everything published in the media, particularly if the media has altered certain statements and denies having made any alterations. Moreover, if a case is already widely covered by the press, the aspect of secrecy of the investigation becomes less important at least regarding facts that have already gone public.[268] In the end lawyers always have to conduct themselves in an honest, discrete and dignified manner given the privileged role they have in the criminal law process.

Media attention also serves external publicity and democratic control of governmental and judicial actions, which is beneficial for the functioning of the rule of law and transparency of the criminal justice system.[269] The notion that the public has the right to information about and transparency of criminal justice is gaining ground. The lawyer's conduct does not have

[264] ECtHR 8 February 2007, ECLI:CE:ECHR:2007:0208DEC001354004 (*Falter Zeitschriften GMBH/Austria*).
[265] ECtHR 9 June 2009, ECLI:CE:ECHR:2009:0609JUD001709503 (*Cihan Öztürk/Turkey*).
[266] See also Franken 2011 and Bohm 2014, p. 42.
[267] Cape & Namoradze 2012, p. 61.
[268] See ECtHR (GC) 23 April 2015, ECLI:CE:ECHR:2015:0423JUD002936910 (*Morice/France*), §§ 138-139 (including references).
[269] Stevens 2010.

to be disciplinarily objectionable or in violation of the right to a fair trial, if he has a good reason to approach the media while the case is still *sub judice*.[270] Aspects that the lawyer should take into consideration before deciding to make comments to the media are: the nature and severity of the crime and the way in which the police, the prosecution, and victims and/or relatives of the victims have sought publicity.[271]

3 The Deontological Element

Unlike the procedural element of the normative framework, the deontological element is more difficult to categorize per role. It has been explained already in Chapter 1 that the core principles, which can be recognised in all regulations of professional ethics for lawyers on a European and an international level, are all reflected in the roles, which criminal defence lawyers have to fulfil in their daily practice. In order to provide a complete overview of the relevant European and international regulations and of the core principles, the structure of the discussion of the deontological element of this normative framework is therefore not related to the lawyer's roles. European and international regulations of professionals ethics for the legal profession refer to the core principles extensively. Therefore, these regulations will first be discussed and consequently the core principles for legal representation in criminal proceedings will be further elaborated.

3.1 The CCBE Code of Conduct for European Lawyers and the Charter of Core Principles of the European Legal Profession

On a European level, the most influential organisation for the legal profession is the Council of Bars and Law Societies of Europe (the CCBE). The CCBE was founded in 1960 and represents bars and law societies of 45 countries (representing over 1 million European lawyers). It acts as a link between the EU and the individual European bars and law societies by having regular meetings with EC officials and members and staff of the European parliament about matters affecting the legal profession. Moreover, the CCBE reacts to national legislation and policy if this directly affects the role and position of lawyers.[272] As such, the CCBE is also closely involved in the decision-making processes concerning EU Directives relating to the work of lawyers, especially in cross-border matters.[273]

[270] See also ECtHR 24 November 2005, ECLI:CE:ECHR:2005:1124JUD005388600 (*Tourancheau and July/France*), *EHRC* 2006/6, m.nt. G. Mols.
[271] Boksem 2013.
[272] The CCBE reacts through position papers, which can be found on its website under 'Documents'.
[273] More information about the CCBE can be found on its website: www.ccbe.eu.

The CCBE has adopted two foundation texts on European professional standards for lawyers: the Code of Conduct for European Lawyers (CCBE Code)[274] and the Charter of Core Principles of the European Legal Profession (CCBE Charter).[275] These texts are very different in nature and therefore complementary. The text of the CCBE Code is binding on all lawyers in the Member States, which means that all lawyers have to comply with the provisions of this Code in their cross-border activities. The CCBE Charter does not have a binding character and primarily aims to create awareness about, and strengthen, the lawyer's position in society. Moreover, the CCBE hopes that this Charter can be an instrument for national bar associations to establish their professional independence.[276]

The CCBE Code of Conduct is divided into five paragraphs in which general principles and the different working relationships of the lawyer are discussed. The Code is accompanied by an elaborate explanatory memorandum. According to the preamble (paragraph 1) of the Code, the lawyer has moral and legal obligations towards his client, the courts, the legal profession in general and towards his individual legal professional colleagues and the public. The lawyer has an important role in safeguarding human rights in the face of state power and other societal interests. This applies even more so to the criminal defence lawyer who is – as has been mentioned before – an intermediary between the State and accused persons. Paragraph 2 of the Code concerns the general principles, which are also found in the CCBE Charter. Paragraph 3 of the Code regulates the lawyer's relationship with his clients, covering subjects such as the acceptance and termination of a case and the acceptance of instructions from the client, the duty to avoid any conflict of interest either between clients or between the lawyer and his client and regulations regarding fees. The lawyer's relationship with the courts is regulated in paragraph 4 of the Code, which concentrates on the lawyer's conduct in court. Section 4.3 of the Code specifically provides that the lawyer has to defend his client's interests "honourably and fearlessly", embodying the principle of partiality. At the same time, this principle of partiality is limited by the notion that lawyers always have to maintain "due respect and courtesy towards the court". Lastly, the relations between lawyers are dealt with in paragraph 5 of the Code with a focus on cross border cooperation between lawyers and everything associated with it. Section 5.8 of the Code encourages all lawyers to keep their legal knowledge and skills, including the European dimension of their profession, up to date through continuing professional development.

In addition to the core principles of the legal profession that are already addressed in the CCBE Code of Conduct, the CCBE issued the CCBE Charter. With this Charter, the CCBE aims to reach beyond the Member States and provide support for bar associations and individual

[274] The CCBE Code was adopted on 28 October 1988.
[275] The CCBE Charter was adopted on 24 November 2006.
[276] The full text of the Code of Conduct for European Lawyers and of the Charter of Core Principles can be found on the CCBE website.

lawyers and to educate the legal professions across the world about the lawyer's important and specific role in society. The Charter includes ten core principles:

1. Professional independence and the freedom to pursue the client's case[277]
2. Duty of confidentiality and respect for professional secrecy[278]
3. Avoidance of conflicts of interests
4. Dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer
5. Loyalty to the client
6. Fair fees
7. Professional competence
8. Respect towards peers
9. Respect for the rule of law and the fair administration of justice
10. Self-regulation

In the Commentary that accompanies the Charter the CCBE describes the lawyer's role as:

> "[…] the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice."[279]

In order to fulfil these roles, professional independence is key. This includes independence from the State, peers, judicial authorities and from his clients and their cases. The CCBE Charter stresses the importance of the lawyer's independence with regard to guaranteeing professional quality and enjoying trust of third parties and courts. Such trust is also gained when the lawyer ensures that he acts with integrity, avoiding any conduct that might bring himself or the legal profession as a whole in disrepute. This duty to act with integrity is quite

[277] On 19 May 2017 the CCBE issued a Model Article on independence (available on its website), in which it elaborately defined the concept of professional independence as a prerequisite for the rule of law. The CCBE also issued Model Articles on Confidentiality (2 December 2016) and on Conflicts of Interests (2 December 2016).

[278] The CCBE issued a Statement on professional secrecy and legal professional privilege on 15 September 2017 (available on its website), because it has been alerted by its members about infringements in several member countries which are jeopardising the confidentiality attached to the relationship between clients and their lawyers. In its statement the CCBE counters the common misconception that the relationship of professional confidentiality is intended to protect lawyers. The only purpose of professional secrecy and legal professional privilege is to protect the interests of the clients. The CCBE stresses the essential importance of confidentiality for a proper functioning of the rule of law and calls on the Member States to increased and better protection of the professional confidentiality.

[279] Commentary to the CCBE Charter on Core Principles for the European Legal Profession, § 6.

far-reaching according to the CCBE and also extends to the lawyer's private life. The lawyer also has a clear duty to support the rule of law and a fair administration of justice and is not allowed to knowingly mislead the court or provide false information. At the same time the lawyer's relationship with his client is paramount. It is important that the lawyer observes his duty to keep all information he receives from his client confidential and to avoid any conflicts of interests between himself and his clients or between clients. The CCBE stresses that confidentiality is not only the lawyers' duty, but also a fundamental human right of clients. When comparing these two aspects of the lawyer's role: supporting the rule of law and a fair administration of justice and acting in the best interests of the client, it becomes clear that the interaction between those aspects of the lawyer's role are particularly delicate for the criminal defence lawyer who is to be considered as the person literally standing between the accused person and the prosecuting State. His professional independence is an important tool for the criminal defence lawyer which enables him to continuously balance the different interests. This importance is also underlined by the CCBE:

> "The CCBE is convinced that only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfil their professional and legal role."[280]

Lastly, it should be noted that the CCBE acknowledges the importance of continuing professional development (CPD) since law and practice change rapidly in the ever-modernising (technologically and economically) justice systems across the EU. Lawyers are therefore encouraged to keep their legal knowledge and practical skills up to date.[281]

3.2 The IBA International Principles on Conduct for the Legal Profession and the Basic Principles on the Role of Lawyers

There are two sets of principles on an international level that need to be discussed here: the International Bar Association's International Principles on Conduct for the Legal Profession 2011 (the IBA Principles)[282] and the Basic Principles on the Role of Lawyers (the Havana

[280] CCBE, Commentary on the Charter of Core Principles of the European Legal Profession Edition 2013, Principle (j).
[281] CCBE, Commentary on the Charter of Core Principles of the European Legal Profession Edition 2013, Principle (g).
[282] The IBA Principles were adopted on 28 May 2011 by the International Bar Association and supersede the IBA International Code of Ethics (1988) and the General Principles for the Legal Profession (2006). The IBA Principles can be found on the IBA website: http://www.ibanet.org under 'IBA Digital Content' – 'Guides and free material'.

Principles).[283] The ten IBA Principles roughly correspond with the CCBE Charter. The aim of both sets of principles is also similar: raising awareness of the specific role and function of the lawyer in a society that supports the rule of law. With the adoption of these principles, the IBA hopes to promote and foster the ideals of the legal profession. The IBA stresses that the principles are by no means meant to be used as criteria to discipline the legal profession, rather they are meant to underpin the importance of the right to (effective) legal defence, which is the cornerstone of all other fundamental rights in a democratic society.[284]

The IBA Principles and the CCBE Charter both find their basis in the Havana Principles, which were adopted by the United Nations in 1990. Yet, these Havana Principles not only provide professional standards, but also obligations specifically addressing executive and legislative powers. These obligations are aimed at facilitating effective legal assistance (for example, access to legal assistance, legal aid, inform the public about their rights, immediate access to a lawyer when detained, confidential communication with a lawyer, ensure that lawyers are properly educated and that they have proper access to information, files and documents) and protection of the specific role of the legal profession in a democratic society. Moreover, the Havana Principles specifically focus on legal assistance in criminal proceedings.

The first paragraph of the Havana Principles states that all persons are "entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of proceedings". This principle is comparable to general fair trial principles, for example, Article 6 § 3 (c) ECHR. According to the Havana Principles, not only individual lawyers but also their professional associations are responsible for guaranteeing services, facilities and other resources and for promoting that the public is properly informed about legal duties and rights.[285] Moreover, it is an important task of those professional associations to advocate the important role of lawyers in society as protector of fundamental rights and freedoms. The associations also have an important task in ensuring that lawyers undergo appropriate training and education and that they are made aware of the "ideals and ethical duties of the lawyer and of human rights and fundamental freedoms".[286] Paragraphs 12-15 cite several duties of the lawyer. Lawyers have to maintain the honour and dignity of the profession "as essential agents of the administration of justice".[287] Regarding their relationship with their clients, lawyers have to act as their legal adviser, act in the best interests of the clients, and assist their clients before courts, tribunals or administrative

[283] Adopted by the UN at its 8th Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in 1990.
[284] IBA Principles, introduction under § 2.
[285] Havana Principles, § 4.
[286] Havana Principles, § 9.
[287] Havana Principles, § 12.

authorities, where appropriate.[288] In performing their duties, lawyers will have to uphold human rights and fundamental freedoms and always "loyally respect the interests of their clients".[289] For the purpose of self-regulation, codes of professional conduct have to be established by the legal profession.[290]

As said, the Havana Principles also provide principles entailing obligations aimed at governments to ensure that lawyers are able to fulfil the duties as set out above. States have to ensure that "efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons".[291] Efficient procedures means that sufficient funding is available for persons who cannot afford legal assistance themselves and that specific measures are secured for vulnerable persons. The Havana Principles emphasise that this concerns a shared responsibility between the State and the professional associations of lawyers.[292] In paragraphs 5-8 several specific safeguards for criminal proceedings are outlined. It boils down to an obligation for the State to inform all persons who are arrested, detained or charged with a criminal offence immediately of their right to be assisted by a lawyer of their own choice.[293] And if the person does not have a lawyer, the State has to assign one "of experience and competence commensurate with the nature of the offence […] in order to provide effective legal assistance" free of charge if necessary.[294] Access to a lawyer should, as a minimum, be guaranteed no later than 48 hours from the time of arrest and the person must be provided with adequate time, opportunities and facilities to consult his lawyer, including confidential communication.[295] Although these obligations are directed at States, they also imply a certain diligence on the part of lawyers: they will have to ensure that enough competent and experienced lawyers are available to assist detained persons within 48 hours upon arrest. The Havana Principles emphasise in different paragraphs the duty of States to protect lawyers against intimidation, harassment or improper interference while performing their legitimate duties.[296] This is an important safeguard for professional independence, as is the provision that lawyers are entitled to "form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity".[297] Lastly, it is noteworthy that the Havana Principles explicitly provide that lawyers should not be identified with their client or

[288] Havana Principles, § 13.
[289] Havana Principles, §§ 14-15.
[290] Havana Principles, § 26.
[291] Havana Principles, § 2.
[292] Havana Principles, §§ 3 and 4.
[293] Havana Principles, § 5.
[294] Havana Principles, § 6.
[295] Havana Principles, §§ 7-8 and 22.
[296] Havana Principles, §§ 16, 17 and 20.
[297] Havana Principles, § 24.

their client's causes,[298] which is also supportive of the notion of professional independence. Similar provisions were not found in the ECHR or EU Directives,[299] which is why it is important to describe these provisions and the underlying core principles as an additional element of this normative framework.

3.3 The Model Code of Conduct for Legal Aid Lawyers and Model Practice Standards for Criminal Defence

The Model Practice Standards for Criminal Defence were drafted by members of the Legal Aid Reformers' Network (LARN)[300] in June 2014. These standards accompany the Model Code of Conduct for Legal Aid Lawyers in Criminal Cases, also drafted by LARN. Both documents have no official status and are thus not binding upon criminal defence lawyers. Different from all the codes and principles discussed so far, these documents apply specifically to lawyers who conduct criminal (legal aid) work, which is why they are particularly relevant in the context of this research.

The Practice Standards cover a whole range of practical guidance for lawyers conducting criminal (legal aid) work, starting with guidance on how to prepare and conduct the initial meeting with the client prior to the police interrogation. According to the Practice Standards, the first meeting with the client is aimed at building a relationship based on mutual trust, to obtain information from the client about the case and to provide information to the client on his rights and on the proceedings.[301] Furthermore, the Practice Standards provide guidance on how to develop an efficient defence strategy based on the information provided by the client during the initial meeting and information obtained through own investigation and prosecution and police disclosure. It is key that the lawyer assumes an active role in pre-trial proceedings, for example by actively attending any investigative act that concerns his client and by encouraging the prosecution to call certain witnesses if necessary.[302] Moreover, the Practice Standards urges the criminal defence lawyer to constantly evaluate the circumstances and conditions of pre-trial custody of his client. In doing so, the lawyer should

[298] Havana Principles, § 18.
[299] See also Cape and Namoradze 2012, p. 60.
[300] The Legal Aid Reformers' Network (LARN) is an international information-sharing network of organisations and individuals working to promote the right to legal aid and effective defence. LARN builds on the experience of the Open Society Justice Initiative, which has been promoting legal aid reforms and created an informal network of public defenders and legal aid managers across Europe and globally. The Network provides a virtual platform for policymakers and legal practitioners to exchange experiences and to collaborate in further developing newly created legal aid systems. LARN is open to any interested organisations and individuals.
[301] Practice Standards, § 1.1. In § 1.3 elaborate practice-based guidance is provided on how to conduct the initial meeting with the client.
[302] Practice Standards, § 2.1.

gather information as to whether the client has a criminal record, health issues, a permanent place of residence, a permanent work place, a family who depends on him, the financial means to pay bail or whether he knows a witness who can testify in his defence.[303] With this information, the lawyer should try to shorten the period of pre-trial custody or propose alternative measures. The Practice Standards also encourage lawyers to explore other procedures which could avoid the client having to go to trial, such as plea arrangements.[304] The Practice Standards are, however, not only concerned with the pre-trial phase, they also provide detailed practical guidance on how to prepare for trial,[305] including carefully inspecting the case file and preparing the client for trial for example by informing him of appropriate attire and how to behave in court, and how to best present the defence's case at trial.[306] Lastly, the Practice Standards give attention to assisting vulnerable clients, such as juveniles and mentally disabled suspects[307] (according to the Standards lawyers who assist vulnerable suspects ideally have undergone specific training) and emphasise the importance of continuous professional development and training.[308]

These Practice Standards are complemented by the Model Code of Conduct for Legal Aid Lawyers. This Code of Conduct further elaborates the core principles that lie at the basis of the legal aid lawyer's conduct in criminal proceedings. According to the Code of Conduct, the lawyer always has to act in his client's best interests, treat clients who rely on legal aid in the same manner as clients who pay for their own lawyer, provide his client with the best advice on the defence strategy, maintain his professional independence, and ensure that the fact that he is paid from legal aid funds does not compromise his professional independence. A lawyer should also conduct himself with honesty and integrity and have respect for the rule of law. It is, furthermore, the criminal defence lawyer's duty to actively defend his client, which includes *inter alia* actively collecting evidence, to always remain critical and alert towards the prosecution's position, explain all defence options and consequences of particular defence strategies to the client, and have the client decide which strategy to follow. The lawyer should, moreover, keep his knowledge and practical skills up to date in order to provide legal assistance of high quality, and always ensure that he has sufficient time and facilities to adequately defend the client. If the lawyer determines that he does not have sufficient time and facilities, he should not accept an appointment as legal aid lawyer. Particularly in legal aid cases it is important that the lawyer keeps a record of each case, which allows not only the lawyer to properly prepare the defence, but also legal aid

[303] Practice Standards, § 2.2.6.
[304] Practice Standards, § 2.3.
[305] Practice Standards, § 2.4.
[306] Practice Standards, § 4 and 5. See also § 6 on advising the client on sentencing procedures; § 7 on conducting a trial in absence of the client and § 8 on appeal proceedings.
[307] Practice Standards, § 9.
[308] Practice Standards, § 10.

authorities to review the case file to assess the lawyer's work, if necessary. In this context exceptions to the principle of confidentiality may be appropriate, but only "for the purpose of assuring that the client has received sufficiently high quality services".[309] Although the Model Code of Conduct prohibits lawyers from representing clients with (potential) conflicting interests, this does not prevent lawyers from representing co-accused in the same case, as long as they do not have conflicting interests. Should a conflict of interests arise during representation, then the lawyer either continues representing the first accused that approached him or if continuation of this representation would cause the lawyer to have to breach, for example, his duty of confidentiality towards the other accused, then the lawyer should withdraw from all cases. A legal aid lawyer may never solicit fees from legal aid clients.

In sum, the core principles that were identified in the European and international codes of conduct and sets of principles applicable to the legal profession can also be found in these documents which are specifically drafted by LARN to serve as guidance for legal aid lawyers conducting criminal work. The guidance is very practice-based and provides detailed hands-on advice to legal aid lawyers from the initial meeting with the client to the sentencing hearing in court.

3.4 Core Principles for Legal Representation in Criminal Proceedings

All European and international deontological regulations, as outlined in the previous paragraph, contain references to the following five principles: independence, confidentiality, partiality, professionalism and integrity. These core principles form the deontological element of the normative framework.

3.4.1 Partiality

The principle of partiality entails that all actions taken by the criminal defence lawyer in criminal proceedings have to be in the best interests of the suspect or accused. A partial professional attitude of the criminal defence lawyer is in itself paramount to the suspect or accused, who has to face the much more powerful institution of the police, the prosecution and the court.[310] Support and legal assistance of a criminal defence lawyer are crucial in balancing this inequality of power, which becomes even clearer when the suspect is held in pre-trial (police) custody.

[309] Model Code of Conduct, section 5.
[310] See also Spronken 2003, p. 56-57.

The principle of partiality together with the principle of confidentiality can also be considered a prerequisite for a strong and effective lawyer-client relationship.[311] Partiality means that the lawyer will sympathise with the accused's wishes regarding a certain line of defence.[312] Additionally, the criminal defence lawyer not only supports the suspect or accused with his legal knowledge, but also can provide practical and social support, particularly in the investigative phase. This can also be considered part of the principle of partiality.

3.4.2 Independence

The importance of independence of the legal profession is well-articulated by the German national Bar Association:

> "In a democratic constitutional state, the independence of the legal profession is indispensable because it preserves the legal system from being exploited as an instrument of political and social power. This independence of the legal profession is in danger if the regulatory functions are transferred from self-regulatory bodies to state offices or committees, which are not made up of lawyers."[313]

Governments should ensure that lawyers can perform their professional duties without any impediments and without fear of being sanctioned in any way purely because they are representing accused in criminal proceedings. Self-regulation is consequently an important precondition to maintain independence.[314] Similar viewpoints can be found in standing

[311] The principle of partiality is codified in Art. 2.7 of the CCBE Code of Conduct: "Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession." It can also be found in the IBA Principles, principle 5: "A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards." Also the Model Code of Conduct for legal aid lawyers refers to the principle of partiality in § 2.1: "A legal aid lawyer must act in the best interests of his/her client; use all reasonable legal measures to do so; and provide active and high quality representation at all stages of the criminal process."

[312] Spronken 2001, p. 503; Model Code of Conduct for Legal Aid Lawyers, § 2.9 (h).

[313] Brochure "Unabhängig und frei – Die anwaltliche Selbstverwaltung" (translated: "Independent and Free – the self-regulation of the legal profession") 2009, p. 19. This brochure can be downloaded from the website of the German national Bar Association: http://www.brak.de – "Für Anwälte" – "Publikationen". See also the Finnish Code of Conduct 2009, Rule 2.2: "The defence of fundamental and human rights and the maintenance of the rule of law require the Bar to be independent vis-à-vis the state. The right of the Bar to independently make rules and regulations to be observed by lawyers and to supervise the observance of such rules and regulations promotes the independence of the Bar."

[314] CCBE Charter of core principles, Principle (a). The IBA International Principles on Conduct for the Legal Profession also refer to the importance of an independent review mechanism for bar associations (p. 14).

ECtHR case law that legal representation is basically a matter between the lawyer and the client.[315] At the same time, the legal profession has to be aware of providing enough transparency and accountability, in order to uphold societal confidence in the legal profession. This can, for example, be achieved by involving judges and lay persons in disciplinary regulation.

The legal profession's independence has several dimensions. It concerns the lawyer's independence from State authorities, judges, prosecutors, peers and clients. Particularly his independent position from State authorities and the judiciary is important for criminal defence lawyers. The State, embodied by authorities such as the police and the public prosecutor are direct adversaries of the defence. The criminal defence lawyer will have to enjoy complete freedom of defence to be able to assist his client as effectively as possible. He must, for example, be free to criticise the authorities, of course within the limitation of criminal proceedings. This freedom can only be achieved if his professional independence is fully respected.[316]

Independence of the legal profession as a whole and of each individual lawyer is a prerequisite for effective access to legal assistance.[317] It is the duty of the lawyer to ensure that his independence is not compromised by "his or her personal interests or external pressures".[318] The CCBE commentary on the principle of independence and freedom of defence (principle A) acknowledges that Bar Associations should be organised as self-regulating entities. Only this way its members enjoy total, independent freedom to legally advise and represent their clients without undue governmental or peer pressure. Moreover, the CCBE links the lawyer's independence from his client to the quality of his work:

---

[315] ECtHR 24 November 1993, ECLI:CE:ECHR:1993:1124JUD001397288 (*Imbrioscia/Switzerland*), § 41.

[316] Respect for professional independence is also one of the key features of the Havana Principles, discussed in the previous paragraph.

[317] See also the Havana Principles, preamble: "Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession"; IBA Principles, principle 1: "A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.".

[318] Art. 2.1 of the CCBE Code of Conduct for European Lawyers: "(2.1.1.) The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties. (2.1.2.) This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure."

> "The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer's work."[319]

Maintaining professional independence also means that the criminal defence lawyer has to carefully consider his own professional limitations. Additionally, he has to decide whether he can relate to his client's defence strategy.[320] The defence lawyer should never have the client dictate him what to do. Still, it should not be misunderstood that finding a balance between professional independence on the one hand and solidarity with the client and his beliefs on the other remains a delicate ethical issue.[321]

With regard to the principle of professional independence, the position of the employed lawyer raises certain questions. In *AM & S v. Commission*[322] the CJEU held – in the context of the question whether certain documents were covered by legal professional privilege – that legal professional privilege only concerned independent lawyers and that this did not include lawyers who are bound to their client "by a relationship of employment".[323] In the view of the CJEU, employed lawyers cannot enjoy the same degree of independence as self-employed lawyers, despite their enrolment with a Bar or Law Society and the deontological obligations they are subjected to. The very nature of the employment "does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence".[324] Moreover, the fact that the employed lawyer is financially dependent on and presumably identifies himself with his employer does put him in a fundamentally different position from lawyers in private practice.[325]

3.4.3 Confidentiality and Legal Professional Privilege

Lawyer-client confidentiality is a 'primary and fundamental right and duty of the lawyer'.[326] It is inherent to the legal profession and as such a *conditio sine qua non* for the lawyer to

[319] CCBE Commentary on the CCBE Charter, Principle (A).
[320] In the previous paragraph this was referred to as the delineation of the principle of partiality.
[321] Spronken 2001, p. 75.
[322] CJEU 18 May 1982, C-155/79, ECLI:EU:C:1982:157 (*AM & S/Commission*).
[323] Id., § 27. This was repeated by the CJEU in its judgment of 14 September 2010, C-550/07, ECLI:EU:C:2010:512 (*Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd/Commission*), §§ 44-47.
[324] CJEU 14 September 2010, C-550/07, ECLI:EU:C:2010:512 (*Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd/Commission*), § 47.
[325] CJEU 14 September 2010, C-550/07, ECLI:EU:C:2010:512 (*Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd/Commission*), § 58.
[326] See for example the IBA Principles, principle 4: "A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct."; CCBE Charter of Core Principles,

function effectively.[327] Without it, it is impossible for the lawyer to build a confidential relationship with his client. Especially in criminal cases, where the suspect might be overwhelmed by the display of power of the police and the prosecution, it is important that the criminal defence lawyer gains the suspect's trust.

From the perspective of the criminal defence lawyer, the concept of confidentiality can be approached as a duty and as a privilege. The defence lawyer has the *duty* to keep everything which the client tells him in the course of his professional activity confidential. Without this duty, it would be virtually impossible to build a lawyer-client relationship on the basis of mutual trust.[328] The duty of confidentiality is supported by the legal concept of professional privilege, which allows the criminal defence lawyer to refrain from testifying in court concerning privileged information and ensures that stricter procedural safeguards apply when a lawyer's premises are searched. As such there is clearly a deontological and a procedural aspect to confidentiality.

3.4.3.1 Avoiding Conflicts of Interests

Although it is not one of the core principles for criminal defence lawyers, the avoidance of representing accused persons with conflicting interests is one of the precepts in which many core principles merge.[329] The interests referred to concern interests of other clients, of the

principle B: "The right and duty of the lawyer to keep client's matters confidential and to respect professional secrecy." The commentary to this principle even states that the duty of confidentiality is a 'fundamental human right of the client'; and CCBE Code of Conduct, Art. 2.3: "(2.3.1.) It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State. (2.3.2.) A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity. (2.3.3.) The obligation of confidentiality is not limited in time. (2.3.4.) A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality."

[327] Spronken 2003, p. 58; see also the Commentary on Principle B of the CCBE Charter on Core Principles, which refers to the principle of confidentiality as the 'essence of the lawyer's function'; Opinion of Advocate General Poiares Maduro, 14 December 2006, C-305/05, ECLI:EU:C:2006:788 (*Ordre des barreaux francophones et germanophone et al. v Conseil des Ministres*), § 37.

[328] See also Temminck Tuinstra 2009, p. 199.

[329] This is for example codified in Art. 3.2 of the CCBE Code of Conduct and can also be found in the Model Code of Conduct for Legal Aid Lawyers, § 6.

criminal defence lawyer himself as well as the interests of peers.[330] In criminal proceedings the interests of third parties who pay for the services of the criminal defence lawyer and the fact that joint representation of co-accused can obstruct an expeditious process of truth finding, can also cause conflicts of interests. In principle, payment by a third party does not have to cause any difficulties, unless that third party requests specific services from the criminal defence lawyer, such as access to the case file.[331] Undoubtedly, this jeopardises the criminal defence lawyer's professional independence and his duty of confidentiality and such situations should therefore be avoided.

The ethical issue in the avoidance of conflicts of interests is the question who decides when interests are conflicting: the criminal defence lawyer, the client or perhaps the police or judicial authorities? And what should happen when a conflict of interests does occur? Should the criminal defence lawyer withdraw from representing all clients? Or can he still continue representing one of the clients? If so, how is the issue of a possible violation of the duty of confidentiality then solved?

3.4.4 Professionalism

Professionalism not only means that the lawyer should have the appropriate training, but also that he does not accept cases if he lacks sufficient legal knowledge or adequate time to handle the case.[332] Without sufficient legal knowledge, the defence lawyer will not be able to properly advise his client on the best defence strategy. Moreover, practical skills are essential so that the defence lawyer can adequately defend the accused in court, examine and cross-examine witnesses and assist the suspect during police interrogation. The principle of professionalism also obliges the criminal defence lawyer to obtain and maintain sufficient legal knowledge and practice skills through continuous education and training. Professionalism can thus serve as an indicator of the quality of the lawyer's work.

[330] See for example IBA Principle 3: "A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation."
[331] Spronken 2001, p. 556.
[332] IBA Principle 9: "A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner."; see also Havana Principles, sub 9; Principle C of the CCBE Charter of Core Principles; and Art. 5.8 of the CCBE Code of Conduct.

3.4.5 Integrity

Integrity is quite a vague concept. According to the Cambridge Dictionary, integrity is defined as "the quality of being honest and having strong moral principles that you refuse to change" and more specifically "someone's high standards of doing their job, and that person's determination not to lower those standards". In the context of this research, integrity is regarded as professional responsibility and a precondition for all the other core principles described above. The CCBE Charter describes the lawyer's duty of integrity as follows:

> "[…] the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. This does not mean that the lawyer has to be a perfect individual, but it does mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession."[333]

Professional integrity thus entails keeping a professional distance from the client, so that any criminal activity is avoided and the lawyer is not identified with the client. At the same time, this distance should not stand in the way of building a confidential relationship with the client.

3.4.6 Relationship between the Core Principles

Although each core principle serves its own purpose, it also has become clear that the core principles have to be considered as intertwining aspects underlying the criminal defence lawyer's conduct. Where lawyers in general should prioritise their clients' interests, this is the case even more for criminal defence lawyers, since their clients are faced with a much more powerful and authoritative opponent in proceedings. In that regard the principle of partiality can be considered as the most prominent core principle for the conduct of criminal defence lawyers.[334] They have to support, advise and assist their clients in an unequal battle against the more powerful State (police and prosecution). Partiality is often articulated in codes of conduct as the starting point for lawyers to always act in the best interests of their clients.[335]

---

[333] CCBE Charter, p. 9.
[334] See also Spronken 2001, p. 501.
[335] See for example CCBE Code of Conduct, § 2.7; IBA Principles, Principle 5; Model Code of Conduct for legal aid lawyers, § 2.1.

The other core principles, with the exception of the principle of professionalism, could be considered as prerequisites to and/or limitations of the principle of partiality. Professional independence, for example, is both a prerequisite for as well as a limitation of the principle of partiality. It is considered as a prerequisite in the sense that lawyers should be able to act independently from the State to pose a defence that is partial and in their client's interests. This is especially relevant in criminal proceedings, where the State is the accused's direct adversary. Maintaining this professional independence can, however, be quite challenging, in particular in circumstances where the court or State appoints the criminal defence lawyer to represent an accused or in legal aid cases. For instance, the fact that the criminal defence lawyer is paid for his legal aid services by the State could make it more difficult for lawyers to remain critical towards judicial authorities[336] and the fact that the lawyer is paid by the State might create an image with the client that the lawyer cannot be completely independent from that same State. This means that the lawyer might have to make greater efforts to convince the client that there is not even an appearance of dependence. Moreover, when the lawyer is appointed, for example, by the court to assist the accused, but the accused does not want to be represented, then it might become difficult for the lawyer to remain independent. On the one hand, he will have to respect his client's wishes, but on the other hand he also has to respect his appointment. Professional independence also limits the principle of partiality, because the criminal defence lawyer has to maintain a certain professional distance from his client. This means that the criminal defence lawyer always remains accountable for his own actions; he should never become the client's mouthpiece or puppet on a string.[337]

While maintaining a professional distance from the client, the defence lawyer will also have to create a working environment in which it is possible to build a confidential relationship with the client, so that the client feels free to share the facts of his case with his lawyer and the defence strategy can be prepared in the most efficient manner. In that sense, confidentiality – and along the same lines the right to legal professional privilege – can be considered another prerequisite for partiality. In light of the principles of partiality and confidentiality, the criminal defence lawyer has to avoid any conflict of interests.

Intertwined with all the core principles is the principle of integrity. This core principle actually serves as an overarching principle, limiting the principle of partiality and further defining the principle of professional independence. Acting with integrity ensures the necessary professional distance and ensures that the criminal defence lawyer's actions are partial, without his becoming too attached to the client or the case.

All core principles, except the principle of professionalism have been connected to the core principle of partiality. Professionalism is an important precondition for the quality of the

[336] See also Cape et al. 2010, p. 282; Model Code of Conduct for legal aid lawyers, § 2.5.
[337] See also De Vocht 2009, p. 455; Spronken 2001, p. 95.

criminal defence lawyer's work. In general, the criminal defence lawyer has a duty to obtain and maintain sufficient legal knowledge and practical skills to represent his client's interests to the best of his abilities. This, however, does not mean that without this knowledge he would be unable to defend his client in a partial manner. In that respect, the principle of professionalism is neither a condition for nor a limitation of the principle of partiality and should be considered as a separate yet important precondition for the quality of the criminal defence lawyer's work.

4 Conclusion

Every suspect and accused person has the right to have a fair trial. This includes a right to an effective defence. It has already been explained in Chapter 1 that the effectiveness of a defence is determined by many different factors. One of these factors is the pre-condition of effective legal assistance offered by criminal defence lawyers. In order to be able to offer this legal assistance, lawyers have to be aware of the minimum procedural safeguards as guaranteed by the ECHR, EU Charter, and EU Directives which are needed to determine whether a defence is sufficiently effective in ensuring that suspects and accused persons fully enjoy the right to a fair trial. Simultaneously, criminal defence lawyers have to be aware of the core principles which serve as basic guiding principles of legal ethics: partiality, independence, confidentiality, professionalism and integrity. These principles are universally accepted and can be found in several international and European regulations and in all codes of conduct throughout the EU. As such, the normative framework consists of (a) procedural safeguards and guarantees which are essential for an effective defence, and (b) basic core principles which are needed to ensure that legal assistance is offered as effectively as possible.

In order to make this complex normative framework comprehensible, the regulations have been categorised according to the four roles of the criminal defence lawyer: the legal representative, the strategic adviser, the trusted counsellor and the spokesperson. In the following Chapter several deontological regulations governing the conduct of criminal defence lawyers in these roles are detailed. In order to be able to determine whether these deontological regulations contribute to effective legal assistance offered by criminal defence lawyers, it is important to understand how the different aspects of the normative framework can be recognised in the different roles of the criminal defence lawyer. This is illustrated in the following schematic overview:

	PROCEDURAL ELEMENT			DEONTOLOGICAL ELEMENT				
	Art. 6 ECHR	Art. 8 ECHR	Art. 10 ECHR	Independence	Partiality	Confidentiality	Professionalism	Integrity
Legal representative	X			X	X			
Strategic adviser	X					X	X	
Trusted counsellor		X				X		
Spokesperson			X		X			X

Due to the simplification which is inherent to a schematic overview, the representation of the procedural element has been limited to the ECHR. Moreover, although the core principles apply to all roles, certain core principles are more prominent per role. In the overview, only the most prominent principles are marked. In the following paragraphs this overview is further elaborated.

4.1 The Criminal Defence Lawyer as Legal Representative

The right to legal assistance as laid down in Article 6 § 3 (c) ECHR, Article 47 second and third paragraphs EU Charter, Article 48 § 2 EU Charter and Article 3 and recital 25 of EU Directive 2013/48 lies at the basis of the criminal defence lawyer's role as legal representative. This right is applicable both prior to and during trial. The right to legal assistance is not only fundamental to the right to a fair trial, but also fundamental to the regulations that govern the conduct of criminal defence lawyers. During the pre-trial phase, the right to legal assistance is particularly relevant prior to and during police interrogation. Based on the right to legal assistance the criminal defence lawyer can exercise his role as a counterbalance for the powers of the police and the prosecution, and support his client not only with legal knowledge, but also with emotional and practical support. Related to the right to legal assistance is the right of the accused to represent himself. This right can present the criminal defence lawyer with serious deontological challenges when he is appointed by the court to represent an accused. What, for example, should he do when the suspect chooses to defend himself rather than to be represented by counsel?

Also related to the right of legal assistance is the right to legal aid. Without the right to legal aid, criminal defence can hardly be effective since most suspects or accused persons are not able to afford legal assistance. However, since governments throughout the EU are

cutting legal aid budgets drastically, the right to legal aid is under serious pressure in many EU Member States. These developments confront criminal defence lawyers with serious challenges to keep offering high quality legal aid, especially in pre-trial proceedings.

The most prominent core principles concerning the role of legal representative are the principle of partiality and the principle of professional independence. The criminal defence lawyer is primarily concerned with the interests of his client: the suspect or accused person. The principle of partiality also forces the other actors in criminal proceedings to respect the criminal defence lawyer's position as the suspect's and accused person's partisan legal representative. Lastly, the principle of partiality and also that of confidentiality, prevents the criminal defence lawyer from representing suspects and accused with conflicting interests. At the same time, partiality is delineated by the principle of professional independence; the defence lawyer will have to remain independent from his client and avoid becoming his client's mouthpiece. Professional independence is also an important prerequisite for the criminal defence lawyer to perform his duties as the suspect's and accused person's legal representative, because it reminds judicial authorities and the government that they have to allow the criminal defence lawyer enough space to effectively perform his professional duties.

The following aspects of the criminal defence lawyer's role as legal representative are further explored in Chapter 3: the acceptance of instructions, the issue of *dominus litis*, representation of co-accused, representation of suspects in the pre-trial phase, particularly in the police station, and representation under legal aid schemes.

4.2 The Criminal Defence Lawyer as Strategic Adviser

The procedural safeguard that lies at the basis of this role is the right to have adequate time and facilities to prepare the defence, which right is laid down in Article 6 § 3 (b) ECHR. This right, however, can only be exercised effectively when it is supported by several other defence rights. Firstly, sufficient knowledge of the prosecution's case is crucial when advising the accused person on his right to silence and the possibilities of settlement proceedings. This means that the right to information (EU Directive 2012/13), particularly the right to be informed about the accusation and about case materials through timely and complete prosecution disclosure, is an important prerequisite for preparing the defence. Secondly, the right to interpretation and translation (EU Directive 20210/64) is of specific interest when the suspect does not speak or understand the language of the jurisdiction he is being tried in. Moreover, in order to effectively prepare the defence strategy, assistance of an interpreter is necessary in case the lawyer and the accused person do not speak the same language. Thirdly, the right to investigate and to examine witnesses in preparation of the trial, which can be derived from Article 6 § 3 (d) ECHR and the principle of equality of arms,

are crucial when preparing the defence. Indeed, information is not only available through case materials, but also through statements of witnesses or technical evidence which can be collected, for example, at the crime scene. Fourthly, the right to confidential communication between the lawyer and his client is paramount to a successful defence, which is emphasised in recitals 22 and 23 of EU Directive 2013/48.

The decision to exercise the right to silence, which is connected to the suspect's privilege against self-incrimination, is an important aspect of the defence strategy. In order to provide a solid advice on whether or not the suspect should exercise his right to silence adequate knowledge of the prosecution's case is necessary. However, advice on the right to silence has to be provided at an early stage of the proceedings, usually before the first police interrogation. At that time, the criminal defence lawyer and the suspect generally do not have sufficient knowledge of the prosecution's case. Advising on the right to silence becomes even more challenging, knowing that in some jurisdictions, such as Belgium,[338] England and Wales,[339] Hungary[340] and Italy,[341] adverse inferences can be drawn from silence. The same challenge exists when advising the accused person on an out of court settlement.

The following core principles are central to the criminal defence lawyer's role as strategic adviser. As can be derived from the procedural element of the normative framework, the criminal defence lawyer's legal knowledge and practical skills are crucial, which means that the principle of professionalism lies at the basis of the criminal defence lawyer's role as strategic adviser. The criminal defence lawyer will only be able to properly prepare the defence and advise the suspect or accused person on his defence strategy, for example exercising his right to silence, when he is sufficiently knowledgeable in the area of criminal law and criminal procedural law. Moreover, he has to be adequately skilled to be able to collect evidence in favour of his client's case. This means, for example, that he has to be trained in interrogating witnesses and in taking their statements.

Another important core principle governing the criminal defence lawyer's role as strategic adviser is the principle of confidentiality. The client is an important source of information for the criminal defence lawyer. The client will, however, only share this information if he feels free to share details of his case with his lawyer. The criminal defence lawyer's duty of confidentiality and the interconnected legal concept of professional privilege, which flow from the core principle of confidentiality, ensure that the criminal defence lawyer is able to create an environment of mutual trust for the client to share information.

[338] Cape et al. 2010, p. 86.
[339] CJPOA 1994, sections 34-37.
[340] Cape et al. 2010, p. 349.
[341] Cape et al. 2010, p. 405.

In Chapter 3 an overview and analysis is provided of the regulations regarding the possibilities for criminal defence lawyers to conduct an investigation on behalf of the defence, regarding advising on the right to silence and pleading including plea bargaining, and also on the assistance of an interpreter during lawyer-client meetings.

4.3 The Criminal Defence Lawyer as Trusted Counsellor

With regard to the criminal defence lawyer's role as trusted counsellor, the right to privacy, as laid down in Article 8 ECHR and Article 7 EU Charter, is an essential element. This right is further specified in Article 4 and recitals 34 and 34 EU Directive 2013/48 in relation to confidential communication between the lawyer and his client. Within the scope of this research ECtHR case law based on Article 8 ECHR focusing on the protection of legal professional privilege is of particular importance. The lawyer has the right to invoke legal professional privilege regarding information which he has obtained in the course of his occupation when his premises are searched or when he is called as a witness to testify in court. As such the concept of legal professional privilege is an important safeguard for the duty of confidentiality. Legal professional privilege, however, does not in itself prevent the lawyer's premises from being searched or from his being called to testify. Confidentiality and professional privilege are not absolute. Under certain circumstances communication between the lawyer and his client can be put under (secret) surveillance and law firms can be searched. According to standing ECtHR case law, investigative measures, however, need to be very strictly regulated, since they are considered extremely intrusive on the right to privacy and may even lead to infringement of the right to a fair trial, in particular of the right of the accused person not to incriminate himself. Strict regulations concern, for example, that search warrants or surveillance orders should be subjected to judicial review, the warrants and orders must have a precisely defined and limited scope in application and duration, and an independent and legally qualified observer must be present during searches of law firms.

The core principle of confidentiality lies at the basis of the criminal defence lawyer's role as trusted counsellor. The lawyer's duty of confidentiality allows him to build a solid working relationship with the accused person, based on mutual trust. Even more so, confidentiality is not only a duty of the lawyer, it is a fundamental human right and can only be breached under highly exceptional circumstances.

The following aspects of the criminal defence lawyer's duty of confidentiality and the concept of legal professional privilege are further elaborated in Chapter 3: material and information which is covered by confidentiality, the exceptions to the duty of confidentiality, the applicability of confidentiality in disciplinary proceedings, and the extent of legal professional privilege and regulations concerning the protection of legal professional

privilege when sharing information with third parties and when the lawyer himself is subjected to investigative measures such as (tele-) communication surveillance or search and seizure.

4.4 The Criminal Defence Lawyer as Spokesperson

The criminal defence lawyer's role as spokesperson is governed by the right to freedom of speech as laid down in Article 10 ECHR and Article 11 § 1 EU Charter. The starting point is that criminal defence lawyers should be able to enjoy considerable freedom of expression when defending their clients. They should for example be allowed to criticise authorities. This freedom is, however, not absolute. Criminal defence lawyers have to refrain from general criticism outside the courtroom or outside the context of a specific case and they should avoid disrespectful wording without a sound factual basis. At the same time, authorities should be aware of the potential chilling effect on the criminal defence lawyer's freedom of defence when their conduct is too swiftly or strictly sanctioned.

The criminal defence lawyer's role as spokesperson is further defined by the core principle of professional integrity and partiality. He will have to present himself as a partial representative of the accused person or suspect in court and in the media. Moreover, the core principle of professional integrity obliges the lawyer to take not only his client's interests into consideration, but also the interests of others involved in criminal proceedings, such as victims. The principle of professional integrity also ensures that the lawyer remains respectful towards the other actors in proceedings even when he, for example, expresses criticism of the administration of justice. In Chapter 3 it is further discussed whether a lawyer is free to comment on pending cases to the media and whether he is free to criticise the other participants in proceedings.

CHAPTER 3
Rules of Conduct for Criminal Defence Lawyers in the EU

1 Introduction

When conducting research into deontological regulations for criminal defence lawyers throughout the EU, it is obvious to also search for specialist bar associations in the Member States. At least 11 Member States have nationally-organised, specialist and professional organisations for criminal defence lawyers, namely Austria,[1] Denmark,[2], Germany,[3] Greece,[4] Italy,[5] Latvia,[6] Luxembourg,[7] Netherlands,[8] Norway,[9] Portugal,[10] and the United Kingdom (England and Wales (solicitors[11] as well as barristers[12]), Ireland,[13] and Scotland[14]). These organisations aim to support and foster fundamental rights of suspects and accused persons and at the same time promote and ensure responsible, knowledgeable and independent legal professionals who can defend civilians involved in criminal proceedings.

All specialist criminal law bar organisations ensure that their members keep their knowledge of criminal and criminal procedural law up to date by organising training events and/or conferences. These events are also a good opportunity for members of these organisations to exchange information and knowledge. The Austrian criminal law bar

[1] Association of Austrian Criminal Defence Lawyers: http://www.strafverteidigung.at (information available only in German).
[2] The National Association of Defence Lawyers: http://www.lffa.dk/ (information available only in Danish).
[3] Criminal Law Working Group of the German Bar Association: https://www.ag-strafrecht.de/ (information avaliable only in German).
[4] Hellenic Criminal Bar Association: http://www.hcba.gr (information only available in Greek).
[5] Assocation of Italian Criminal Chambers: http://www.camerepenali.it/ (information available only in Italian).
[6] Latvian Criminal Bar Association (information obtained from the website of the European Criminal Bar Association): http://www.ecba.org/content/index.php?option=com_content&view=article&id=302&Itemid=52
[7] Association of Luxembourg Criminal Defence Lawyers: https://alap.lu/ (information available only in French).
[8] Dutch Association of Criminal Defence Lawyers: http://www.nvsa.nl/ (information available only in Dutch). The NVSA also has a separate department for young criminal defence lawyers: https://www.nvjsa.nl/ (information only available in Dutch).
[9] The Criminal Bar Committee of the Norwegian Bar Association (information obtained from the website of the European Bar Association): https://www.advokatforeningen.no/om/org/organer/faggruppene/forsvarergruppen/ (information available only in Norwegian).
[10] Association of Criminal Defence Lawyers: http://forumpenal.pt/ (information available only in Portuguese).
[11] The Criminal Law Solicitors' Association: http://www.clsa.co.uk/
[12] The Criminal Bar Association: https://www.criminalbar.com/
[13] Criminal Bar Association of Northern Ireland: http://www.barofni.com/page/specialist-bar-associations
[14] The Scottish Bar Association promotes itself on social media, such as Twitter: https://twitter.com/ScottishCBA

association also publishes an academic series to educate its members. Austria, England and Wales, and Latvia indicate explicitly that their specialist organisations also serve as platforms where like-minded professionals can meet. Most organisations (such as in Austria, Denmark, Greece, England and Wales, Italy, Latvia and the Netherlands) regularly comment on draft legislation concerning criminal and criminal procedural law and defence in criminal proceedings in particular. Membership of these specialist criminal law bar organisations is voluntary and they are organised privately. Criteria for membership are very diverse among these organisations. Most organisations do not apply strict admission criteria.[15]

It should be noted that in most Member States it is not common for lawyers to specialise in criminal defence, simply because the amount of work is insufficient to earn a decent living. With ever decreasing criminal legal aid budgets and a growing demand for criminal defence lawyers' involvement in pre-trial proceedings, this lack of specialisation is more and more becoming an imminent threat to the availability of effective and expert criminal defence throughout the EU. This observation makes this research particularly relevant, because it will be noteworthy for all lawyers providing legal assistance to suspects and accused persons in criminal proceedings to understand which regulations govern their conduct. These regulations are detailed in this Chapter 3.

1.1 Plan of Discussion

The main focus of this Chapter 3 is on deontological regulations for criminal defence lawyers in specific and general codes of conduct in the EU Member States,[16] which are discussed in paragraphs 2 and 3 respectively. In paragraph 2, the specific sets of regulations for criminal defence lawyers as identified in Austria, Belgium, France, Germany, England and Wales, Scotland and the Netherlands are detailed. Not only are these regulations mapped out in detail, attention is paid also to the scope and design of these sets of regulations. The identification of specific sets of regulations for criminal defence lawyers in several EU Member States is already an important finding in itself. Apparently, the specific role and position of criminal defence lawyers has been a trigger for the (specialist) Bar Associations in these EU Member States to design separate guidelines to explain criminal defence lawyers how to interpret the general codes of conduct in their daily practice. Therefore these specific sets of regulations will be discussed separately in paragraph 2 of this Chapter.

[15] This information was not only collected from the abovementioned websites, but also from interviews conducted with criminal defence lawyers. Several interviews have been conducted during the course of this research with lawyers from most Member States under review.

[16] The codes of conduct of Greece, Hungary and Portugal could not be included because there were no English, German, French or Dutch translations available. This lack could be partly remedied only for Hungary by using literature in English on legal professional ethics in Hungary.

Since these regulations specifically aiming at criminal defence lawyers always need to be understood in conjunction with the regulations in the general codes of conduct it is relevant to also analyse these general codes of conduct. Moreover, since not all EU Member States provide separate regulations for criminal defence lawyers, it is noteworthy to also scrutinize the general codes of conduct which apply to all members of the legal profession, including criminal defence lawyers. Therefore, in paragraph 3, specific and relevant regulations as identified in the general codes of conducts of all EU Member States under review are detailed and analysed. A twofold approach was used to scrutinise these codes for regulations which are specifically applicable to the legal representation of suspects and accused persons in criminal proceedings. First, the four roles of the criminal defence lawyer were divided in several aspects as follows.

The role of the criminal defence lawyer as legal representative includes:

- the acceptance of and withdrawal from a case;
- the issue of *dominus litis*;
- defending co-accused;
- quality assurance; and
- legal representation on the basis of legal aid.

The role of the criminal defence lawyer as strategic adviser includes:

- the right to information and (defence) disclosure;
- advising on right to silence and on (out of court) settlement;
- contacting witnesses;
- the use of an interpreter; and
- keeping the client informed.

The role of the criminal defence lawyer as trusted counsellor includes:

- the duty of confidentiality;
- legal professional privilege; and
- sharing information with third parties.

The role of the criminal defence lawyer as spokesperson includes:

- the freedom of defence; and
- conduct in court and in the media.

Second, the wording of the regulations in the general codes of conduct was used to filter only those regulations which explicitly refer to criminal proceedings. Selective wording included: defendant, suspect, detained person, accused, criminal defence, criminal cases,

and criminal proceedings. As such, specific provisions for criminal defence were identified in the general codes of conduct of Belgium, Croatia, Cyprus, England and Wales, Estonia, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Scotland, Slovenia and Sweden. These regulations concern *inter alia* acceptance of a case and withdrawal from a case, the lawyer-client relationship, advising on how to settle the case, for example, by plea bargaining, defence disclosure, and contacting witnesses.

In paragraph 4 the main findings as presented in paragraphs 2 and 3 are summarised and analysed integrally, so that the sub research questions which are central to this Chapter 3 can be answered:

Which deontological regulations, particularly applicable to criminal defence lawyers, can be identified in the EU Member States?

2 Specific Sets of Deontological Regulations for Criminal Defence Lawyers

In several EU Member States specific sets of regulations governing the conduct of criminal defence lawyers were found, namely in Austria, Belgium, France, Germany, the Netherlands, and the United Kingdom (England and Wales and Scotland). In this paragraph these sets of regulations are detailed and it is explained how these regulations are applied in relation to the general codes of conduct for lawyers that also exist in all of these Member States.

2.1 Austria: Grundsätze der Strafverteidigung[17]

The Austrian Bar Association has ten working groups, called *Arbeitskreis*. Among those working groups is a working group for professional law (*Berufsrecht*) and a working group for criminal law (*Strafrecht*). These two working groups collaborated in drafting the *Grundsätze der Strafverteidigung* (translated as "Basic Principles for Criminal Defence"; or "Basic Principles").[18] According to its preamble, the Basic Principles are not intended to create new norms for the conduct of criminal defence lawyers, rather they explain to criminal defence lawyers how to apply the general rules of conduct in the context of criminal proceedings. In total there are 13 Basic Principles. These principles can be divided into three main categories: a definition of what constitutes a dutiful defence, regulations concerning client care and regulations concerning the defence strategy.

[17] The full and original text of the *Grundsätze der Strafverteidigung* can be requested from the author.
[18] http://www.strafverteidigung.at/

A Dutiful Defence

According to the Basic Principles, a dutiful defence rests on two pillars: partiality and confidentiality, which are at the same time essential pre-conditions for a fair trial. The Austrian criminal defence lawyer should also act with honesty and integrity to uphold the legal profession's honour and dignity. In doing so, the criminal defence lawyer protects the accused and he should avoid making any incriminating statements that could harm the accused.[19] Regarding confidentiality, which is essential for the lawyer-client relationship, the Basic Principles prescribe that the lawyer has to protect the confidential character of any correspondence and communication with the client. This applies, in particular, to taking additional and practical measures concerning detained clients, such as marking lawyer-post as "*Verteidigerpost*".[20]

Client Care

Authorities should be kept informed at all times about the status of the legal representation. If the criminal defence lawyer originally retained is no longer representing the accused, that lawyer should inform the authorities immediately to ensure that the authorities send any information to the correct lawyer.[21] The Basic Principles furthermore detail the position of the criminal defence lawyer when representing more than one accused in the same case or when organising a joint defence with several colleagues. Paramount to this position is that the criminal defence lawyer deals with the representation of each accused with "diligence, loyalty and conscientiousness",[22] which means that he cannot make any incriminating statements regarding any of the accused, not even if this would benefit the position of the accused he is representing (this of course only applies to the situation of a joint defence). Moreover, the client decides on the defence strategy. This means, for example, that the lawyer will have to respect the client's wishes to proceed with a strategy that harms his own case in order to protect another accused. A joint or shared defence is only possible if all accused give their informed and written consent.[23]

Defence Strategy

With regard to setting up the defence strategy, several basic principles are relevant. Firstly, the criminal defence lawyer will need to have access to case materials in order to inform his client properly.[24] Secondly, the lawyer can also conduct (or have conducted) an investigation

[19] Basic Principle 1.
[20] Basic Principle 2.
[21] Basic Principle 3.
[22] Basic Principle 5.
[23] Basic Principle 5.
[24] Basic Principle 6. The lawyer should also inform the client of any (planned) investigative measures which will be taken against the client.

to gather evidence in favour of the defence. He can, for example, contact witnesses or visit crime scenes. The lawyer is strongly advised to make written reports about any investigative measure he takes. These reports are used for purposes of accountability and to substantiate pleas. Regarding this investigation, the lawyer decides which measures have to be taken, or formulated differently: the accused can never oblige the lawyer to investigate.[25] In this context the criminal defence lawyer should also be allowed to contact expert witnesses, even though according to Austrian law such witnesses can only be contacted via the prosecution.[26] Thirdly, the lawyer has to continuously confer with his client about essential elements of the defence strategy; he will have to keep his client up to date on any new developments and advise his client on the consequences of chosen strategies. In advising the client, the lawyer should not be afraid to not only highlight the favourable, but also the less favourable outcomes. That is the only way the client can make an informed decision about his defence strategy.[27] Fourthly, the media can play an important part, particularly in sensational cases, which should not be underestimated by the criminal defence lawyer. Contacting the media can be either a reaction to an earlier publication by the prosecution, or be on the initiative of the defence. Sharing information about the case with the media can thus also form an essential part of the defence strategy.[28] Fifthly, third parties, such as witnesses or victims, can be persuaded by the criminal defence lawyer not to use their procedural rights in exchange for (pecuniary) compensation.[29] In that way, the case can be settled out of court and on the initiative of the defence. Lastly, the accused has the possibility of entering into a procedural agreement with the prosecution, for example that the accused will act as a crown witness in exchange for sentence reduction, even below the minimum sentence.[30] Such agreements are, however, not legally binding and should only be reached with explicit and informed client consent.[31]

2.2 Germany: Thesen zur Strafverteidigung

In 1992 the German national Bar Association (the *Bundesrechtsanwaltskammer*) issued the first edition of the *Thesen zur Strafverteidigung* (Statements on Criminal Defence; or the Statements). The Statements were renewed in 2015.[32] According to the preamble, the

[25] Basic Principle 8.
[26] Basic Principle 11.
[27] Basic Principle 4.
[28] Basic Principle 13.
[29] Basic Principle 10.
[30] Austrian criminal procedural law knows minimum and maximum sentences.
[31] Basic Principle 12.
[32] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck. The original text of the Statements can be requested from the author.

Statements are meant to be guidelines for criminal defence lawyers to help them avoid typical professional pitfalls and to train their professional ethical compass.[33] The Statements are very detailed and elaborate (76 statements in total). The Statements are divided into 12 paragraphs and are accompanied by elaborate guidance. These 12 paragraphs are discussed below in the order they are included in the Statements.

General principles

Paragraph 1 concerns two general principles of criminal defence, namely partiality (Statement 1) and professional independence (Statement 2). At the core of these regulations lies the criminal defence lawyer's crucial role in upholding and protecting the rule of law. According to Statement 1, this role is fulfilled in particular by defending and supporting the accused person's rights. Additionally, the criminal defence lawyer needs to be professionally independent: independent from the State and independent from his client. Moreover, the criminal defence lawyer's freedom to assist the client to the best of his abilities is guaranteed in this paragraph. The lawyer's freedom to offer an effective defence to the accused is only limited by the boundaries of his professional ethics and forms a counterweight to the free investigation on the part of law enforcement agencies.[34]

The acceptance of a case

Paragraph 2 deals with the acceptance of a case (*Das Verteidigungsmandat*). The criminal defence lawyer should respond to a request to accept a case immediately, so that it is clear to the client what to expect within a reasonable time limit (Statement 3). If the client is in custody, it is of particular importance that the communication between the lawyer and the client – in person as well as written correspondence – is free from any surveillance. It is the lawyer's duty to ensure that any lawyer-client correspondence is marked properly, so that the authorities know that it is privileged and it is his duty to limit this correspondence to matters relating to the acceptance of the case (Statement 4). When accepting or taking over a case, the criminal defence lawyer can freely shape his working relationship with the client, within the limitations of civil and criminal law. The lawyer will, however, have to be sufficiently self-critical to determine whether he has the necessary time, skills and knowledge to carry out the mandate properly (Statement 5). Representation by more than one criminal defence lawyer is also possible and in that case the lawyers should ensure that they coordinate their tasks and exchange information (Statement 6).

[33] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. VI: "Vielmehr sollen sie grundsätzlich „eine Orientierungshilfe ohne Rechtsqualität sein, vor typischen Gefahren der Berufspraxis warnen und an die rechtliche Sensibilität und Aufmerksamkeit appellieren".
[34] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, pp. 18-19.

Furthermore, regulations are included regarding withdrawal from a case. A distinction is made between withdrawing from the case when the lawyer is chosen by the client (Statement 7) and when the lawyer is appointed (Statement 8). In the first instance, it is emphasised that the lawyer should in principle not withdraw on short notice, except in very exceptional circumstances. Such circumstances exist, for example, when there is an insurmountable difference of opinion between the client and the lawyer concerning the defence strategy or when the client makes disparaging remarks to third parties about the lawyer or his firm. The lawyer should, however, keep any disadvantages to the client due to the withdrawal to a minimum.[35] In the latter instance, it is clarified that the lawyer should not accept an appointment if it is clear that the client does not wish to be represented by him. A lack of trust between the client and the lawyer would hinder an effective defence. In certain circumstances, however, the lawyer is allowed to accept the appointment although the client opposes the representation. For example, when it is in the interests of the accused to be represented and it is clear that the accused's ability to determine of his own free will is limited.[36]

The criminal defence lawyer is allowed to represent the client in his absence, but only if the merits of the proceedings allow and if the lawyer is able to submit a separate written power of attorney stating that he is allowed to represent the accused in his absence (Statement 9). Although the criminal defence lawyer is not bound by the client's instructions regarding the defence strategy, he will have to determine the defence only in consultation with the client and if they disagree, he should withdraw or if withdrawal is not possible, he will have to take all circumstances into account and may never act against the client's wishes (Statement 10). The lawyer is also allowed to take into account the interests of third parties when determining the defence strategy (Statement 11); however, this is limited by the fact that a lawyer may never actively cooperate in a defence strategy which would lead to the conviction of a client of whom he knows that he is innocent (Statement 12). This shows that the client's autonomy in determining the defence strategy may conflict with the lawyer's duty to protect the client's interests.[37]

Moreover, the representation of co-accused is dealt with in this paragraph. The Statements refer to representation of co-accused by different lawyers; no reference is made to the situation in which one lawyer represents more than one accused in the same case. The starting point is that each individual lawyer always puts his own client's interests first (Statement 13). Furthermore, all lawyers should carefully coordinate the defence and share information with each other (Statement 14). Although it is clear that such a coordinated and joint defence of co-accused can be beneficial for the accused (there is a broader source of

[35] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 23.
[36] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 24.
[37] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 29.

information available to conduct the defence), the lawyer should also be aware of the possible negative consequences and he should properly inform his client thereof. Dangers of a joint defence are in particular that the interests of individual clients may conflict.[38]

Lastly, the lawyer is warned not to use his own financial assets to help the client (Statement 15). This regulation ensures that the lawyer remains professionally independent from the client. However, the lawyer may use his own financial resources in very exceptional circumstances, when the client's personal integrity allows and when very negative consequences of the criminal proceedings cannot otherwise be avoided.[39]

The duty of confidentiality

Paragraph 3 includes regulations concerning the duty of confidentiality. This duty covers everything that has been entrusted to the criminal defence lawyer within the scope of the *Verteidigungsmandat*, from the moment he has been requested to accept the case (Statement 16). The duty of confidentiality is unlimited in time, which means that the duty continues after the lawyer-client relationship has ended or the client's death (Statement 17). Although the client can release the criminal defence lawyer from his duty of confidentiality, the lawyer still has an independent responsibility to decide whether disclosure of confidential information is in the client's best interests and if not, the lawyer is allowed to refuse disclosure. And only in very exceptional circumstances, when a conflict of interests arises, is the criminal defence lawyer allowed to breach his duty of confidentiality (Statement 18). For example, in case the lawyer himself is subject to criminal or disciplinary proceedings, when this is the only way for the lawyer to prevent an innocent person from being convicted or harm being done to a third party. In the latter cases, the lawyer will always have to try to convince the client that it is better to come forward, but if he does not succeed to persuade the client, then he may breach confidentiality.[40]

Setting up the defence strategy

Paragraph 4 deals with setting up the defence strategy. A criminal defence lawyer has a duty to speak the truth and contribute to the process of truth-finding; however, this duty is limited by his duty to assist and protect the client's interests (Statement 19). It basically can be reduced to the lawyer not being allowed to knowingly provide the court with false information.[41] In line with this prohibition, the lawyer is also not allowed to appoint witnesses or expert witnesses of whom he knows that they will provide a false statement. Moreover, the criminal defence lawyer is not allowed to rely on documents of which he knows that they are forged (Statement 20). As long as the lawyer uses lawful and honest means to fulfil his

[38] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 31.
[39] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 33.
[40] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 37.
[41] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 38.

duties of informing and advising the client about his rights and the legal consequences of his decisions, he cannot be considered to be aiding the client in committing any criminal offence, unless he knows or suspects that the client will use this advice for illegal purposes (Statement 21). In the latter case, the lawyer will have to end his services to the client immediately (Statement 22). The lawyer will also have to make clear to the client that his professional ethics do not allow him to support the client in bringing forward any distortion or obscuration of the facts (Statement 23). However, this prohibition does not mean that he is obliged to provide the court with any information that could be detrimental to the client's case.[42] In advising the client on the defence strategy, the lawyer should provide the client with all the available options and related consequences to conduct the defence. In the end, the client decides autonomously on the defence strategy (Statement 24).[43]

The criminal defence lawyer is furthermore allowed to conduct his own investigation as part of the preparation of the defence strategy. In individual cases, the lawyer is even obliged to conduct an investigation (Statement 25), particularly when certain lines of inquiry might disprove the accusation against the client, or lessen his guilt or even prove his innocence.[44] The lawyer will also determine whether this investigation will actually benefit the defence. Furthermore he is advised to carefully document his investigation (Statement 27) and keep his client up to date on his investigative activities (Statement 28). The lawyer is also permitted to contact witnesses, expert witnesses, and co-accused in the course of his investigations, this includes witnesses for the defence and witnesses who have been brought forward by the police and the public prosecution (Statement 29). He should, however, be careful not to influence the witnesses and avoid even the appearance of influence. This does not mean, however, that the lawyer is not allowed to discuss substantial matters with witnesses (Statement 30) and with co-accused (Statement 32).

Settlement proceedings (agreements)

Paragraph 5 includes regulations governing the criminal defence lawyer's conduct in settlement proceedings, also called agreements. Reaching an agreement with the public prosecutor or the court can be a useful defence strategy (Statement 40). The criminal defence lawyer should, however, be aware of the fact that agreements have not only advantages, but also certain risks. It is the criminal defence lawyer's duty to fully inform his client about all the pros and cons of an agreement and particularly about the risk of disclosure of better defence options (Statement 41). The criminal defence lawyer is not as a party involved in the settlement proceedings;[45] he merely advises the client. The client makes

[42] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 41.
[43] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 42.
[44] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 42.
[45] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 59.

the final decision whether or not to accept the agreement and also carries full responsibility for his decision (Statement 44). To avoid any miscommunication between the client and the lawyer, the lawyer is advised to ensure that all communication concerning the settlement proceeding, also communications which have taken place in the presence of the client, are well documented (Statement 46).

Access to the case file and disclosure of information to third parties

Paragraph 6 concerns the right of the defence to have access to the case file and to disclose information to third parties. The criminal defence lawyer is obliged to seek access to the case file as soon as he has accepted the case (Statement 48). The lawyer therefore has an active duty to obtain information from the police and the prosecution. Since practice has shown that criminal defence lawyers tend to be quite careless with the original documents provided to them by police and prosecution,[46] specific regulations have been included prescribing that the lawyer has to ensure that all original case material provided to him remains intact (Statement 49). The lawyer is allowed to make copies of the case materials, to properly prepare the defence (Statement 50). In most cases the public prosecution already provides a copy of the file for the defence.[47] The criminal defence lawyer is allowed, and on the client's explicit request even obliged, to share copies of the material with his client (Statement 51). This underlines the close cooperation between the lawyer and the client in preparing the defence, which was also noticeable in paragraph 4 on preparation of the defence strategy.[48] Disclosure of case material to third parties is only possible if this in the interests of the defence and with the client's consent. Moreover, the lawyer has to be sure that the information that is disclosed will not be abused by the third party (Statement 52). Any third party should assist the defence in some way (for example, expert witnesses).[49]

In principle, although the lawyer has to ensure that there is no informational gap between him and his client, in certain circumstances the lawyer might not be allowed to disclose information to the client (Statement 53). For example, when the client's health would be at risk if the client were aware of the information or the progress of the criminal investigation would be jeopardised if the information was disclosed. The latter exception, however, is always limited in time.[50] In order to keep his client fully informed, the lawyer should in principle share all his knowledge concerning investigative measures which will be executed against the client (Statement 54); concerning information about third parties such as co-accused and witnesses (Statement 55); and concerning information shared in discussions with the police, the public prosecution and the court (Statement 56). It might occur that the

[46] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 65.
[47] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 66.
[48] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 67.
[49] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 68.
[50] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 70.

authorities will only share certain information upon the criminal defence lawyer's guarantee that he will (at least for a certain period of time) not share this information with his client. The lawyer will have to consider whether he will be able to agree to such conditions and discuss this possibility with the client. Only when the client consents, will the lawyer be able to agree to such conditions, but this should only be done in the interests of the defence (Statement 56 (2)).[51] It should be noted that the criminal defence lawyer is not obliged to keep this information to himself when the request to keep the information confidential is made only after the discussion has taken place. In that case, the lawyer may decide to share the information with his client, but should only do so if he is convinced that this will not be detrimental to his client's case (Statement 56 (3)).[52]

Clients in custody

Paragraph 7 provides regulations governing the conduct of criminal defence lawyers assisting clients who are kept in custody. Particularly when the client is kept in custody, it is important that the criminal defence lawyer is permanently available and personally committed and that he assists his client during the early phases of criminal proceedings (Statement 58). Assistance in this regard might go beyond legal assistance, and include psychological and social assistance. The lawyer should also be aware of the fact that consultations with a detained client usually take more time than consultations which can be held in the lawyer's office, so that he will have to consider whether he will be able on a practical level to spend this extra amount of time.[53] To ensure an effective defence, all lawyer-client communication should be free of supervision (Statements 59 and 60). This does, however, place responsibility on the lawyer to ensure that this communication is only used for purposes related to the defence.[54]

Contact with the media

Paragraph 8, concerning the lawyer's conduct in the media, uses as a starting point that criminal defence should not be conducted in or through the media (Statement 63). The lawyer should seek contact with the media only in very exceptional circumstances, for example when media coverage already has threatened the presumption of the client's innocence.[55] The lawyer is only allowed to contact the media with the client's consent and only after he has fully informed the client of all the risks, advantages and disadvantages of contacting the media (Statement 64). The lawyer may not provide the media access to case material and should never put himself in the forefront when contacting the media

[51] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 72.
[52] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 72.
[53] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 74.
[54] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 75.
[55] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 77.

(Statement 65). Moreover, the lawyer has to make an effort to make sure that he is notified of press releases from judicial authorities beforehand (Statement 66).

Matters concerning compensation

Paragraph 9 provides regulations concerning agreements on compensation for the lawyer's services. Appointed defence lawyers are allowed to negotiate additional fees, but they should never make their services dependent on those additional fees (Statement 69). This regulation is actually a consolidation of existing practice. Appointment of a lawyer on the basis of legal aid is not made dependent on the client's indigence or neediness, so that – according to the Statements – it is harmless if additional fees are agreed upon. These additional fees should, however, never lead to the situation in which the lawyer makes his services dependent on whether or not the client is willing or able to pay additional fees.[56] The lawyer is also allowed to have fees paid by third parties, but only if he discloses all circumstances to his client, his client agrees, gives his client's interests priority at all times and informs the third parties about these conditions (Statement 71). Third parties in this regard could be friends, family or employers. The lawyer should, however, be careful when accepting payment from third parties if it is clear that by paying the fees the third party wishes to have a say in the course of the defence strategy. At all times, the lawyer needs to preserve his professional, independent position.[57]

Lastly paragraphs 10, 11 and 12 deal with liability, participation of companies in criminal proceedings and cross-border defence respectively. Concerning the last, the Statements refer to BORA (general German Code of Conduct for lawyers) which has incorporated several regulations concerning sharing information and costs when conducting a cross-border defence.

2.3 The Netherlands: Statuut voor de raadsman in strafzaken[58]

All Dutch lawyers are by law members of the national Dutch Bar Association.[59] The National Bar Association is a public body, with the authority to regulate the legal profession by way of decrees.[60] It is the Bar's responsibility to represent the interests of all lawyers and to supervise lawyers' compliance with the law, regulations and decrees applicable to the legal profession.

[56] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, pp. 84-85.
[57] Bundesrechtsanwaltskammer, *Thesen zur Strafverteidigung*, 2. Auflage (2015), München: Beck, p. 87.
[58] The full and original text of the *Statuut voor de raadsman in strafzaken* can be requested from the author.
[59] Act on Lawyers, Art. 1.
[60] Act on Lawyers, Art. 17.

As such, it is also the national Bar's responsibility to ensure a certain level of quality regarding the legal services offered by the members of the Bar. Quality assurance of the services offered by individual lawyers is primarily organised in a reactive manner by allowing clients and other interested parties to file a complaint about a lawyer's conduct with the president of the local Bar Association. He will then either decide on the complaint himself or refer the complaint to the disciplinary tribunal. Additionally, in June and September 2017, the Dutch Bar Association adopted regulations amending the Decree on the Legal Profession (*Voda*) to introduce a system of quality assessment based on structured feedback.[61] According to the Bar Association's website: "lawyers can learn from each other's experiences, problems, successes and challenges from daily practices". This insight should lead to more effective professional conduct.[62]

According to the amended *Voda*,[63] quality assessment takes place by way of peer review, supervised group discussions, or structured peer consultation. All these forms of assessment have in common that they are conducted by peers; lawyers who are active in the same field of law. Confidentiality is guaranteed when quality is assessed through peer review and supervised group discussions. The structured peer consultations take place under the supervision of a moderator. Since these moderators do not always have a duty of confidentiality, it is stressed in the *Voda* that lawyers have to make clear arrangements on confidentiality when using structured feedback. Furthermore, reports which are produced following these assessments should not contain any substantive description of what has been discussed.

Each lawyer has to participate yearly in one of the three mentioned forms of assessment. Supervised group discussions and structured feedback take up at least eight hours per year; peer review takes up at least four hours per year (in all cases at least two contiguous hours with a maximum of four hours per day).[64] The lawyer also earns continuing profession development (CPD) training credits when participating either in peer review or supervised group discussions.[65]

As said, all lawyers are by law members of the national Bar Association. In addition to this membership, criminal defence lawyers can choose to apply for membership of the specialist Association of Criminal Defence Lawyers (*Nederlandse Vereniging voor Strafrechtadvocaten* – NVSA).[66] The aim of NVSA is to foster expert practice of criminal defence lawyers by

[61] See: https://www.advocatenorde.nl/dossier/kwaliteit/kwaliteitstoetsen. At the time of finalising this research, the new regulations had not yet entered into force.
[62] Whether this renewed system of quality assessment will actually lead to more effective professional conduct is yet to be discovered. At the time of finalising this research, the regulations were not yet in force.
[63] Decree on the Legal Profession (*Voda*), Art. 4.3a et seq (new).
[64] Decree on the Legal Profession (*Voda*), Art. 4.3a and 4.3b (new).
[65] Decree on the Legal Profession (*Voda*), Art. 4.4 (new).
[66] For more information on the *NVSA* visit: https://www.nvsa.nl/

organising expert courses and meetings. Membership is voluntary and admission is based on the following criteria:

- at least five years of registration as a lawyer;
- a minimum of 500 hours per year has to be spent on criminal cases in the year prior to application;
- at least 12 training credits in the area of criminal law in the year prior to application; and
- completion of the specialisation training of the Willem Pompe Institute of Utrecht University.

To remain a member of NVSA, the criminal defence lawyer has to gain 12 training credits in the area of criminal law and spend a minimum of 500 hours on criminal cases each year. The yearly membership fee includes a subscription to specialised criminal law journals.

The main standard regulating the conduct of all lawyers practising in the Netherlands is laid down in Article 46 Act on Lawyers. It basically consists of three fundamental principles: the lawyer has to (1) carefully act on behalf of and protect the interests of his clients, (2) act according to the law and orders issued by the national Bar Association, (3) refrain from conduct unsuitable for a 'decent' lawyer. These principles are further developed in the Code of Conduct 2018, issued by the national Bar Association.[67] This general Code of Conduct is used not only by lawyers to determine their conduct, but also by disciplinary tribunals to establish a normative framework. Although this Code of Conduct also applies to criminal defence lawyers, NVSA has adopted a separate set of regulations, explaining the application of Article 46 Act on Lawyers in the context of criminal proceedings: the Statute for criminal defence lawyers (*Statuut voor de raadsman in strafzaken* – the Statute).[68] It should be noted that the Statute refers to the general 1992 Code of Conduct, the predecessor of the Code of Conduct recently issued in February 2018.

The Statute exists alongside the general Code of Conduct and expresses NVSA's view on the role and position of criminal defence lawyers in protecting the fundamental values of the rule of law. Disciplinary tribunals also refer to this Statute in addition to the general Code of Conduct when confronted with disciplinary cases concerning criminal defence lawyers.[69]

[67] The specific regulations for criminal defence lawyers that were identified in this general Code of Conduct 2018 are discussed in paragraph 3.

[68] The general assembly of NVSA adopted the Statute on 13 November 2003. There was also criticism of the adoption of the Statute, see for example Fibbe and Spong in *Advocatenblad* 2004, iss. 4, p. 230-233, who argue that the Statute is a confusing document because it is aimed at two different target audiences (the legal profession and society as a whole) and that it has no additional value in addition to the already existing general rules of conduct.

[69] See for example: ECLI:NL:TAHVD:2012:YA4469; ECLI:NL:TADRARN:2010:YA1015; ECLI:NL:TADRSGR:2011:YA1828; ECLI:NL:TADRAMS:2009:YA0037.

Compared to the other sets of regulations detailed in this paragraph, the Statute is unique in its design. It not only contains rules of conduct, but it also formulates guarantees or procedural safeguards which have to be provided by the judicial authorities and Governments in order for the criminal defence lawyer to effectively exercise his professional duties. For this purpose the Statute is divided in Part A: rules of conduct and Part B: certain guarantees and privileges ensuring an effective defence. Both parts are detailed below.

2.3.1 Part A: Rules of Conduct

Rules of conduct are formulated in Part A of the Statute, and are largely based on the general Code of Conduct for lawyers. Additionally, the Statute provides extensive guidance and specific guidelines explaining how criminal defence lawyers can apply these rules in their daily practice. The rules and guidance are structured around the following themes: counsel's duties, free choice of a lawyer, client's interests versus other interests, the confidential relationship between lawyer and client, duty of confidentiality, the provision of information to the media, third parties and publicity.

1. Counsel's Duties

According to the Statute the duties of the criminal defence lawyer include that he acts as the trusted counsellor, defender and advisor of the accused, always in the client's best interest and within the limitations of the law.[70] He informs his client about the proceedings and advises him how to best use his procedural rights.[71] If the client is deprived of his liberty, the lawyer should take into account the consequences of this detention for the client's social life and emotional and physical well-being.[72] This includes regular visits from the lawyer to his detained client and more practical matters such as providing the client with a change of clothes if he has to stay in police custody for a longer period of time. In his performance, the lawyer is at all times professional, accurate and diligent.[73] Acting professionally also means the lawyer also is able to acknowledge the fact that he lacks the necessary knowledge or skills to ensure effective legal representation and consequently that he either advise the client to instruct another lawyer or seek advice to better assist the client.

2. Free Choice of a Lawyer

The next theme is the freedom to choose one's lawyer. According to the Statute, an accused should always have the freedom to choose his own lawyer; this can be derived from the right

[70] Rules 1, 5 and 6.
[71] Rule 2.
[72] Rule 3.
[73] Rule 4.

to self-representation.[74] Also in cases based on legal aid, the accused is free to choose his own lawyer.[75] Although the ECtHR has ruled that it is possible – under strict conditions – to appoint a lawyer not in accordance with the choice of the accused,[76] the Statute states that the lawyer should return instructions if the accused does not want to be represented by him.[77] The freedom to choose one's lawyer also implies that the lawyer will have to respect this choice and if this means that he has to transfer the case to another lawyer, he will have to do so as carefully and diligently as possible.[78] Of course, the lawyer should enquire with his client whether he was able to make his choice out of free will, especially when the other lawyer has been contacted by third parties to take on the defence.

3. Client's Interests versus Other Interests

The interests of his client should always be the main priority of the criminal defence lawyer; this is also referred to as the principle of partiality and implies that serving clients with conflicting interests is, in principle, prohibited. The Statute provides rules and guidance on how to deal with situations in which conflicting interests might arise, such as when the lawyer's services are paid by a third party or when co-accused wish to be represented by the same lawyer.

Generally, the lawyer is not prohibited from accepting payment from third parties. However, he can only accept such payment with the consent of his client, and only after reassuring himself that his client's interests will not be harmed and that the client can still determine his defence position freely, without any negative influence from the third party.[79] The lawyer should, for example, not accept any payment by a third party if that means that he will have to provide that party with information from the case file or if it means that he will have to make sure that the client will invoke his right to silence.[80]

A lawyer can defend more than one client in the same proceedings, as long as all clients consent to the joint representation and as long as there are no conflicting interests.[81] The Statute recommends that the lawyer put the conditions of the joint representation in writing and that he inform his clients of the possibility to end the joint representation at any

[74] In the Netherlands the accused can also defend himself, there is no compulsory legal representation by counsel (Art. 28 CCP).
[75] Cape et al. 2007, p. 169; Barendrecht et al. 2014, p. 100.
[76] Cape et al. 2010, p. 57; Cape et al. 2012, p. 57; Spronken 2001, p. 450-452; ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*), par. 29 and ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*), par. 54.
[77] Rule 7.
[78] Rules 8 and 9.
[79] Rule 10.
[80] Guidance to Rule 10.
[81] Rule 11.

moment.[82] According to Dutch disciplinary case law, it is the lawyer's responsibility to determine whether there is a conflict of interests and to act accordingly. In any event, the lawyer will have to withdraw from his representation of all clients when he is of the opinion that one of the clients is not able to determine his defence position freely.[83]

The Statute is furthermore very clear on the fact that the client's interests always prevail over the interests of the criminal investigation. The lawyer should use all procedural rights and privileges to ensure that his client's interests are best served and he must not feel limited by the interests of the administration of justice in doing so.[84] Procedural powers should be used as long as they are in the best interests of the client, irrespective of its influence on the progress of the criminal investigation or administration of justice. At the same time, he is not allowed to abuse his (professional) privileges.[85] The lawyer can, for example, be accused of abusing his privileges when he commits a criminal offence by using these privileges. For example, when he uses the right to free communication with the client to import prohibited items into the penitentiary facility. The lawyer could never be accused of abusing procedural powers, simply because these powers are primarily awarded to the accused.[86]

4. The Confidential Relationship between Lawyer and Client

The basis for the relationship between lawyer and client is confidentiality and trust. It is the lawyer's duty to make every possible effort to create and maintain a confidential relationship with the client.[87] Within this relationship the lawyer has to confer with his client about possible defence strategies and the lawyer should never follow a defence strategy that is not approved by the client.[88] This implies that in the end it is the accused who decides on the defence strategy, which is also in line with the right to self-representation. This does not mean, however, that the lawyer has to do everything the client orders him to do; when the lawyer is requested to set up a defence, which in his professional opinion cannot be defended, he is allowed to refuse. If the lawyer and the accused cannot agree on the defence strategy, the lawyer will have to withdraw from the case and refer the accused to another lawyer.[89]

The obligation to discuss the case thoroughly with the client also implies that in the event of a *trial in absentia*, the lawyer will have to realise what the consequences are of defending his absent client. According to Dutch criminal procedural law, it is possible to defend an

[82] Guidance to Rule 11.
[83] Spronken 2001, pp. 559-563; Prakken & Spronken 2009, pp. 271-279.
[84] Rule 12.
[85] Rule 13.
[86] Guidance to Rules 12 and 13.
[87] Rule 14.
[88] Rule 15.
[89] Rule 16.

accused in his absence when the lawyer declares before the judge that the client has explicitly authorised him to defend his client's case.[90] This, however, has serious consequences for the time limits for filing appeals, which will be considerably shorter.[91] In practice, this means that the lawyer should carefully consider whether he is able to contact his client on short notice after the final judgment has been rendered to decide whether he wishes to file an appeal.

5. The Duty of Confidentiality

Essential for building the confidential relationship between lawyer and client as discussed above is the duty of confidentiality: the lawyer is obliged to keep confidential any information provided by the accused in the course of proceedings.[92] It is the lawyer's responsibility to fulfil this duty of confidentiality, not only for the sake of his client, but also to uphold the public's confidence in the legal profession. Even if the client wants the lawyer to publish confidential information, it is still the lawyer who decides whether he will publish certain information or not. In deciding on publishing confidential information, he will have to balance the interests of his client and the interests of third parties (for example witnesses or victims). Moreover, he will have to consider the impact of the publication of the information on society. The duty of confidentiality also has to be upheld – save for very exceptional circumstances[93] – in the event the lawyer has to answer in cases in which he himself is accused of being an accomplice in the accused's case.[94]

There are actually only two situations in which the duty of confidentiality may be breached. Firstly, in case of duress it is permissible to violate the duty of confidentiality without the consent of the client, for example when a life-threatening situation can be avoided by disclosing confidential information. Still, in doing so the lawyer should protect the interests of his client as much as possible. Secondly, anti-money laundering legislation states that lawyers have to report cases of substantive money transactions in cash between him and his client.[95]

---

[90] Art. 279 CCP.

[91] According to Art. 404 CCP appeal must be filed within two weeks after the final judgment has been made public. When the defendant has been convicted in his absence, without representation by a lawyer during the trial, the appeal only has to be filed within two weeks, after the defendant has been properly notified of the final judgment. If no appeal is filed within the set time limitations, the judgment becomes definitive.

[92] Rule 17.

[93] Until now, such exceptional circumstances have never occurred according to disciplinary case law.

[94] HvD (Disciplinary Appeal Tribunal) 26 September 1983, no. 662, *Advocatenblad* (Lawyers' Gazette) 1984, p. 248; see also Prakken & Spronken 2009, p. 168-170.

[95] The Statute itself does not provide any guidance on this matter.

6. Providing Information to the Media and other Third Parties

Elaborating on the rules and guidance concerning the duty of confidentiality, the Statute provides rules of conduct on supplying information to third parties, for example the media.[96] The lawyer is allowed to supply information to third parties, as long as this is done carefully and with the full consent of the client. In doing so, the lawyer will have to take into account the interests of third parties and keep their personal information from publication if this does not serve any purpose with regard to the defence. The lawyer will always have to ensure that he keeps control over what is published in the media, for example when he has been interviewed he should insist on reviewing the transcript of the interview before it is published.

In the Netherlands, the general Code of Conduct 1992 quite clearly stated that (criminal defence) lawyers should refrain from publishing case material outside the courtroom.[97] This rule is not absolute; exceptions are possible if, for example, the accused's interests are seriously prejudiced because the case has been made public by others.[98] The Dutch Statute for criminal defence lawyers is more lenient and allows a criminal defence lawyer to share information, as long as he carefully weighs all interests involved and his client consents.[99] When the lawyer shares information, he will have to take into account the interests of third parties, and provide the information anonymously if sharing personal details does not contribute to the client's interests.[100] Particularly when it concerns publicity in written media,

[96] Rules 18 and 19.

[97] Code of Conduct 1992, rule 10 § 2: "In criminal proceedings lawyers are not allowed to provide copies of the case material to the media. The lawyer should moreover be reluctant to provide the media access to case material." Extensively citing from the case file is the same as allowing the media to access to the case file (HvD (Disciplinary Appeal Tribunal) 1 December 2008, 4987 (not published)). In the revised Code of Conduct 2018 a similar regulation can be found in Rule 3.

[98] Code of Conduct 1992, guidance to rule 10; Disciplinary Tribunal (*RvD*) Amsterdam 27 October 2009, ECLI:NL:TADRAMS:2009:YA0117. In this case (*Puttense moordzaak*), which drew a lot of media attention, the lawyer decided to share information from the case file with national media, because the arrest of his client had been national news. On the day of his arrest, the public prosecution had organised a press conference claiming to have arrested the "correct suspect". Following this press conference, many news articles were published in which the lawyer's client was depicted as the perpetrator. Consequently, the lawyer was approached by a journalist of a national newspaper (*Algemeen Dagblad*) and provided this journalist with oral information and copies of a part of the case file. On the basis of this information two news articles were published. The first had been reviewed by the lawyer, the second had not. The public prosecution filed a disciplinary complaint with the president of the local Bar Association, stating that the lawyer had violated rule of conduct 10. Following this complaint, the Bar president filed an official objection with the disciplinary tribunal of first instance. The objection focused on the fact that the lawyer had given copies of parts of the case file to the journalist, which caused the lawyer to lose control over the case file. Also, the lawyer had not conferred with the Bar president beforehand about sharing this case material with the newspaper. The Tribunal agreed with the Bar president that the lawyer had conducted himself unprofessionally, but did not impose a sanction because the lawyer had already showed remorse for his behaviour.

[99] Rule 18.

[100] Rule 19.

the lawyer will have to ensure that the publication is correct[101] and preferably receive a draft for review. He is also advised[102] to confer about a media strategy with the client if it is foreseen that the client's case will attract substantial media attention. Otherwise the lawyer will have to have client consent for each incident in which he is required to act in the media.[103] A media strategy, however, never releases the lawyer from his duty to assess his client's interests, public interests and his duties of independence and confidentiality in each individual instance that requires him to act in the media. Seeking publicity without the client's consent (or even knowledge) violates the lawyer's duty of confidentiality and could ultimately result in a breach of trust between the lawyer and client.[104] Such practice would also be detrimental to general society's confidence in the legal profession as a whole, so that it should be avoided at all cost.

When considering the purpose of publicity, the lawyer will have to weigh several interests: the interests of the client, of the criminal investigation and of third parties (for example, victims or witnesses). According to Prakken and Spronken, the interests of the client should always be paramount, so that if publishing all or part of the case file is in his interests, this should be done, even if this could be detrimental to the criminal investigation. The lawyer does not have to inform the prosecutor beforehand that he is going to publish this information.[105]

---

[101] The lawyer is, however, free to explicate his client's points of view, which do not necessarily have to be correct, as long as it is clear that it is his client's opinion and not his own (Disciplinary Tribunal (*RvD*) Den Bosch 9 May 1994, Advocatenblad 1995, p. 122).

[102] Guidance Rules 18 and 19.

[103] The lawyer needs the client's consent to publish any information about the case, see Prakken & Spronken 2009, p. 517.

[104] See Prakken & Spronken 2009, p. 516 (including references, in particular footnote 176). Confidentiality also continues after the lawyer-client relationship has ended. And a lawyer should also refrain from any unnecessarily offensive comments concerning a former client in the media. Particularly in a case in which the lawyer has already been subject to disciplinary sanctions for such unnecessarily offensive comments, he should – as a professional – have been aware of the fact that everything he says in public would be widely reported in the press. Therefore, he should have exercised constraint and at least refrained from making any negative comments about his ex-client. See: ECLI:NL:TADRSHE:2011:YA1764.

[105] Prakken & Spronken 2009, pp. 20 and 511-521. See also Spronken 2001, pp. 590-595 and Disciplinary Tribunal (*RvD*) The Hague 14 June 2010, ECLI:NL:TADRSGR:2010:YA0901 and Disciplinary Appeal Tribunal (*HvD*) 14 February 2011, ECLI:NL:TAHDV:2011:YA1407. In this case a disciplinary complaint was filed by the public prosecutor against the lawyer concerning two criminal proceedings. In both cases the lawyer was representing the victims and in both cases he had requested copies of the case file from the prosecutor in order to prepare actions for damages. The prosecutor had provided this case file information in both criminal proceedings, but only in the second case reminded the lawyer that he was only to use the information for the purpose of preparing actions for damages and should therefore not disseminate the information. Despite this warning, the lawyer provided access to this information to the written press and provided the city councillor with a copy of the information. As a result, the prosecutor filed a disciplinary complaint for negligence. In first instance, this complaint was upheld. Indeed, the lawyer should have found a less harmful way to bring the case to the public's

2.3.2 Part B: Guarantees and Privileges

Part B of the Statute contains several norms directed at the Government to ensure that criminal defence lawyers are offered certain guarantees and privileges necessary to effectively defend their clients. In these norms NVSA clearly expresses its view on the preconditions necessary to ensure an effective defence that supports the rule of law. These norms are related to: unlimited and confidential communication between lawyer and client, legal professional privilege, right to information, freedom of defence, own investigation by the defence, and prevention of criminalisation of the lawyer.

1. Unlimited and Confidential Lawyer-Client Communication

Unlimited and confidential communication between lawyers and their clients is essential for an effective defence. According to the Statute, the interests of the criminal investigation or the administration of justice can never be an excuse to limit lawyer-client communication.[106] Unlimited access to the client is probably most urgent in the initial stage of the proceedings, right after arrest. The lawyer should be able to contact his client under at least the same conditions as investigative authorities.[107] Moreover, the lawyer should be offered the time and the facilities to prepare his client for interrogation and have the right to attend the interrogation; this includes interrogation when the client is heard as a witness.[108]

Although assisting co-accused is not prohibited in principle, in practice, lawyers are often not allowed to visit co-accused who are detained at the police station. Usually, police officers automatically assume that co-accused have conflicting interests, which prohibits them from being represented by the same lawyer. Additionally, it is often not in the interest of the criminal investigation to have co-accused represented by the same lawyer. From the viewpoint of the defence, however, co-accused can very much benefit from joint representation. The police should be made more aware that it is the lawyer who decides – not the police – whether there is a conflict of interests between the accused and that the

attention and should have followed the prosecutor's instruction that the material was not to be distributed. In appeal, the lawyer was acquitted. Although the rationale behind the way the lawyer had balanced all interests involved could not be fully assessed, for lack of information, the Appeal Tribunal ruled that the lawyer had shown sufficient responsibility and had not transgressed the boundaries of professional ethical behaviour. The facts that were decisive in this regard were in particular that: the prosecutor had indicated that he himself would also have provided the city councillor with a copy of the case file, the lawyer was not bound by the preconditions attached by the prosecutor to the provision of the case material, and the lawyer had not provided the written press with a copy of the material but only access.

[106] Rule 20.

[107] Rule 22.

[108] Rule 21. It should be noted that the Statute predates the time when EU Directive 2013/48 was implemented in the Netherlands. The right of the suspect to have a lawyer present during police interrogation is now regulated in Art. 28d CCP.

lawyer can only decide if he has had the opportunity to speak to all accused in the case. Despite the benefits of joint representation for co-accused, lawyers are sometimes quite hesitant to visit co-accused, due to the possibly negative financial and other implications, since the lawyer will have to withdraw from representation of all accused if during the course of representation a client conflict arises.[109]

The drafters of the Statute draw attention to the fact that according to Dutch criminal procedural law,[110] the prosecutor can temporarily (for a maximum period of six consecutive days) prohibit lawyer-client communication when certain circumstances raise the suspicion of abuse of freedom of communication. The decision of the prosecutor is under the direct review of the court (*post factum*) and may only be imposed for the period of the proceedings when the accused is not officially summoned for trial yet.[111] The drafters of the Statute advocate abolishment of these provisions. The following is not included in the Statute, but it illustrates the issue addressed by the drafters of the Statute.

Although the order for incommunicado detention primarily concerns the suspect, it is not unthinkable that the order also affects lawyer-client communication. At the very least it affects the way in which the lawyer is able to conduct an effective defence. For example, contacting a witness to enquire whether he can give a statement for the defence can already be considered suspicious and possibly contradictory to the purpose of incommunicado detention.[112] Indeed, this way suspects could still contact the 'outside world' through the services of the lawyer. According to Dutch standing disciplinary case law, it is a general rule that from the moment the client is detained incommunicado, a criminal defence lawyer should be very careful to communicate about the case with anyone except his client.[113] Even the appearance of conduct that infringes the purpose of the incommunicado detention can be highly detrimental to the reputation of and social confidence in the legal profession as a whole and could endanger professional privileges that are granted to the legal profession and should therefore be avoided. The Disciplinary Appeal Tribunal is keen to uphold professional privileges and its case law is therefore quite strict: when determining whether the lawyer has acted in defiance of the purpose of the incommunicado order, it is not relevant whether the conduct of the lawyer has actually been detrimental to the criminal investigation.[114] Particularly this latter consideration, which is applied not only when the suspects are detained incommunicado,[115] seriously restricts the lawyer's possibilities to

[109] Guidance to Rule 11.
[110] CCP, Art. 50 §2.
[111] CCP, Art. 50 §3 and 50 §4.
[112] Boekman & Bannier 2007, p. 114.
[113] See Prakken & Spronken 2009, pp. 83-86 (including references).
[114] Disciplinary Appeal Tribunal 22 August 1994, no. 1902 and 1913, *Advocatenblad* 21995, p. 912; see also Prakken & Spronken 2009, p. 82.
[115] See Spronken 2001, pp. 570-573 (including references).

conduct an effective defence, because it practically leaves no room for the criminal defence lawyer to explain his actions. Although disciplinary tribunals acknowledge the serious constraints this practice puts on the defence, they stress that criminal defence lawyers are not allowed to make exceptions to the incommunicado detention, not even if they are convinced that the interests of a client outweigh the interests of the investigation.[116]

Although this very strict disciplinary approach might be considered detrimental to an effective criminal defence,[117] it is clear that alleged abuses of freedom of communication can be dealt with in disciplinary proceedings and according to the drafters of the Statute this is also most preferable.[118] Moreover, if immediate action is required, a lawyer can even be immediately suspended.[119]

2. Legal Professional Privilege

From the viewpoint of the lawyer, the duty of confidentiality and legal professional privilege are two sides of the same coin. The first is a duty towards the client, while the latter is a privilege protecting confidential information against authorities and third parties. The Government will have to guarantee sufficient protection of confidentiality and professional privilege,[120] should not force the lawyer to give up any confidential information[121] and should not use any investigative powers against lawyers that might infringe on their duty of confidentiality or professional privilege.[122] The following information on searches and covert surveillance, which might jeopardise legal professional privilege, is not included as such in the Statute. It does, however, illustrate the urgent need for solid guidelines and regulations for criminal defence lawyers in order to preserve and protect their legal professional privilege from unauthorised State interference.

Legal professional privilege is put under pressure due to far-reaching investigative powers, such as searches and seizures and covert surveillance of telephone communications. The national Bar Association has issued guidance (the Guide) providing a regulatory framework for lawyers on how to safeguard confidentiality and legal professional privilege when lawyers' premises are searched in the context of criminal proceedings.[123] The Guide

[116] Amsterdam Disciplinary Tribunal 24 November 2009, No. 09-228A and 09-229A, ECLI:NL:TADRAMS:2009:YA0179.
[117] Spronken 2001, p. 641-642.
[118] Guidance to rules 20-22.
[119] Act on Lawyers, Art. 60ab et seq.
[120] Rule 23.
[121] Rule 24.
[122] Rule 25.
[123] The original title of this Guide is "*Handleiding voor advocaten bij strafrechtelijke doorzoeking*" (the Guide). It was first issued on 2 June 2008, thoroughly revised on 4 March 2013 and updated in December 2014 and February 2018. There is a separate guide for Bar presidents, which has to be read in conjunction with the guide for lawyers (latest issue February 2018). Lastly the Bar Association issued a concise action plan for law firms for quick reference when investigative authorities are at the door.

begins with an elaborate introduction, in which the procedural context of searches and seizures in law firms is explained.[124] Consequently, a practical action plan is provided for lawyers and their employees on how to handle investigative authorities when they are at the door,[125] which is further elaborated in detailed guidance.[126] In broad outlines, the guidance comes down to the following.

The moment investigative authorities announce their arrival at the front desk of the law firm, the receptionist has to warn the lawyer concerned. The investigative authorities are accompanied by the president of the local Bar Association or his substitute. The role of the local Bar president is to safeguard the interests of the lawyer concerned, of his law firm and of the firm's clients.[127] The lawyer should be allowed to confer with the local Bar president in private before the search begins. In the meantime, the investigative authorities have to be seated in a room where they do not have access to any confidential material. Lawyers are advised to ensure that one or more witnesses (preferable a colleague) are present during the search and to request the investigative authorities to present identification. The lawyers are furthermore advised to ask as many questions as possible about the scope and aim of the search, to get as clear a picture as possible. Usually the authorities will request the relevant material be handed over voluntarily; lawyers are advised to refuse, unless they are able to determine that this material is not covered by professional privilege or that this material can be regarded as *corpora* or *instrumenti delicti*. Along the same lines, permission for the search should also be refused. Moreover, lawyers are advised to invoke professional privilege, unless they have been able to deliberate with their client and they are of the opinion that disclosure of confidential material is in the client's best interests. Still, disclosure is only possible with the client's explicit consent. Lawyers should only allow access to confidential material after they have been able to check this material together with the local Bar president. Making (digital) copies of the material is also highly recommended. When confidential material is seized, lawyers are advised to explicitly object to this seizure. If the investigative authorities and the lawyer disagree about the confidential nature of certain material, it is highly recommended that the lawyer encourage the investigative authorities to seal the material concerned. The investigative judge will then, at a later moment after hearing the arguments of all parties concerned, decide whether the material can actually be seized. This guidance applies fully to the situation where the lawyer concerned is himself a suspect, even more so, suspects cannot be requested to disclose any information according

These documents can be found on the website of the national Bar Association: https://www.advocatenorde.nl/voor-uw-praktijk/modellen-handleidingen-formulieren/handleiding-extern-onderzoek

[124] Guide, § 1.

[125] Guide, § 2.

[126] Guide, § 3 and § 4.

[127] "*Handleiding voor dekens bij strafrechtelijke doorzoeking*", February 2018, p. 3.

to procedural regulations. Only in very exceptional circumstances, for example, when the lawyer is suspected of being part of a criminal organisation together with his client(s), committing very serious crimes, may investigative authorities demand access to confidential material, if this material is identified as *corpora* or *instrumenti delicti*. Lastly, lawyers are advised to not have themselves interrogated during the search because any statement made may be recorded. If they are a suspect themselves, they can invoke their right to silence and are strongly advised to ensure that they have legal assistance.

Another serious infringement on legal professional privilege might occur when communication is subjected to covert surveillance. Dutch investigative authorities use this power frequently[128] and as from 1994 it became clear that also telephone conversations between accused and their lawyers were included in the surveillance, put *in verbatim* and added to the case file as evidence. According to the prosecution these were only incidents, but gradually courts no longer accepted this excuse and the prosecution was called to give account for its behaviour. In 2007, during the *Hells Angels* case,[129] the court declared the prosecution inadmissible because of severe, widespread and repetitive violation of criminal procedural legislation[130] which caused serious damage to the public's trust in the criminal justice system. This judgment made the prosecution and the Ministry of Justice more susceptible to the complaints of the Bar Association about the practice on telephone tapping. Finally in 2011, this resulted in an automated system of number recognition. Lawyers have to ensure that the telephone numbers they use for confidential communication are registered with the national police, who will put them in the system of telephone tapping. All numbers that are tapped are checked against this list of registered numbers and as soon as the system recognises a number, the tap is stopped and any recordings already made are deleted.[131] This, however, means that lawyers will have to guarantee that also persons with a derived duty of confidentiality use only these registered telephone numbers to conduct

[128] In 2015 on average 1,415 taps were performed on telephone and internet communication in the Netherlands: TK 2015-2016, 34 475 VI, 1, 18 May 2016, Annual Report Ministry of Security and Justice 2015, p. 53.

[129] Amsterdam District Court, 20 December 2007, no. 13/133067-04 (ECLI:NL:RBAMS:2007:BC0685). Declaring the prosecution inadmissible in its prosecution is the most severe sanction ordered by the court for defaults that occurred in the pre-trial investigation (Art. 359a CCP).

[130] Specifically CCP, Art. 126aa on the composition of the case file, particularly CCP, Art. 126aa(2), which states that any materials relating to confidential communication with professionals with legal privilege have to be destroyed and may not be added to the case file.

[131] The Bar Association also adopted a Regulation about this system of number recognition on 1 April 2011 (Government Gazette 2011, 6728), last revised on 25 June 2013 (Government Gazette 2013, 18910). This Regulation primarily prescribes the procedure of the registration of business phone numbers by lawyers, underlines the importance of this registration and orders lawyers to use only these numbers for confidential communication with clients and to ensure that these numbers are not used by unauthorised persons. Recently, however, there have been discussions about the fact that it seems relatively easy for criminals to use the registered phone numbers, without the lawyer even knowing it.

confidential communication. Furthermore, it imposes a professional duty and responsibility on lawyers that they will prevent any unauthorised person from using these registered numbers and the use of these numbers for illicit purposes.[132] It is sometimes impossible to call a client using a registered telephone line. So when this happens, the lawyer should clearly indicate at the beginning of the conversation that it concerns a confidential communication.[133]

3. Right to Information

In order to prepare the defence strategy effectively, the lawyer and the accused need sufficient information about the case. The Government and judicial authorities need to ensure that the defence is fully informed in due time about all the relevant case material.[134] The clause "except in the interest of the criminal investigation" is intentionally left out of this rule; according to the drafters of the Statute there are no valid reasons why the interest of the criminal investigation should be more important than the interest of an effective defence. The only reason why information may be held back temporarily is when it would otherwise cause life-threatening situations for third parties. In the event that the lawyer is offered to have access to case material under the condition that he will not discuss this information with his client, he should be very reluctant to accept such an offer because it can seriously damage the confidential relationship he has with his client.[135] Moreover, the actual value of such information for the defence is questionable if he cannot discuss it with his client. It seems to be impossible to use this information without consulting the client about it.[136]

4. Freedom of Defence

In the Netherlands nothing the criminal defence lawyer brings forward during the legal representation of his client may be used in evidence against his client.[137] This starting point enables the lawyer to speak freely when defending his client, so that he can, for example,

---

[132] Regulation on the legal profession (*Regeling op de advocatuur*), § 5.3; "*Handleiding voor advocaten ter waarborging van de geheimhoudingsplicht en het verschoningsrecht bij extern onderzoek*", § 3.

[133] "*Handleiding voor advocaten ter waarborging van de geheimhoudingsplicht en het verschoningsrecht bij extern onderzoek*", rule 42.

[134] Rule 26.

[135] This exemplary situation is given in the guidance to Rule 26.

[136] In this regard reference is also made to the case of *M.M.* (ECtHR 25 July 2017, ECLI:CE:ECHR:2017:0725JUD000215610 *(M.M./the Netherlands)*), which is discussed in Chapter 2, para. 2.2.3. In this case the ECtHR found that Article 6 ECHR had been violated because, due to procedural regulations, M was not able to share relevant information with his defence lawyers and therefore could not fully benefit from his right to an effective defence. As is shown in para. 3.2.5.1 of this Chapter, the deontological regulations for solicitors in England and Wales prohibit solicitors from disclosing certain information to the client.

[137] Spronken 2001, p. 256.

counter the prosecution's case vigorously and interrogate witnesses diligently. As long as he conducts the defence in good faith, he may not be held responsible for the accuracy of the statements made on behalf of his client.[138] In and outside of courtrooms, he should be able to express whatever he thinks is appropriate in the interest of the defence. There are actually only two limitations to this freedom of defence. First, the lawyer may not knowingly mislead the court and second, he may not make allegations against third parties that he cannot prove. This means that the lawyer should not make any statements which he knows are false and he has to ensure that his statements are not unnecessarily offensive to third parties. It does, however, mean that the lawyer is allowed to harm the interests of third parties, as long as he can substantiate that this is proportionate and in the interests of the defence.[139]

Regarding the wording in which the lawyer should express himself in court, Dutch disciplinary tribunals have determined that a lawyer's wording should be modest and respectful. For example, saying that the investigating officer concerned should rather be walking behind the garbage truck is 'not done'.[140] Also, the lawyer should refrain from general and personal criticism regarding the prosecutor's or judge's functioning.[141] Moreover, criticism has to be specific and well-argued and the lawyer should refrain from making any personal attacks or undermining judicial authority.[142] Furthermore, the lawyer is not allowed to state facts which he knows to be untrue, but where it concerns facts he receives from his client or others, he does not have a duty to investigate or verify these facts.[143]

Lastly, the lawyer always has to take the interests of others into account, which means that he should refrain from making "unnecessarily offensive remarks". It should be noted

[138] Rule 27 and guidance.

[139] Rule 27; see also ECtHR 20 May 1998, ECLI:CE:ECHR:1998:0520JUD002540594 (*Schöpfer/Switzerland*); Spronken 2001, pp. 512-513 and pp. 585-590 and Prakken & Spronken 2009 pp. 492-503 for an overview of Dutch disciplinary case law and ECtHR case law on this matter.

[140] Amsterdam Disciplinary Tribunal 16 June 2008, no. 08-046A (unpublished). See also Prakken & Spronken 2009, pp. 526-528.

[141] See for example Amsterdam Disciplinary Tribunal 2 February 2010, no. 09-186U, ECLI:NL:TADRAMS:2010:YA0351. The lawyer had pressed charges against a prosecutor for defamation of his clients. A copy of the charges was sent to ANP (national new agency), which published several articles on the matter. One of these articles mentioned the prosecutor concerned using his full name. A disciplinary complaint was filed by the Chief Public Prosecutor on behalf of the prosecutor concerned, claiming that the lawyer had expressed himself in an unnecessarily offensive manner towards the prosecutor in the media. The Disciplinary Tribunal held that the lawyer had personally offended the prosecutor, which was unnecessary and thus irreconcilable with the lawyer's duty to maintain society's confidence in the legal profession as a whole. The disciplinary complaint was therefore justified, but the court saw no reason to impose a disciplinary sanction. The fact that the prosecutor in this case was mentioned using his full name seemed to be decisive, because in another case the complaint was considered unfounded since the lawyer had never personally expressed himself towards the prosecutor (Amsterdam Disciplinary Tribunal 2 February 2010, no. 09-178U, ECLI:NL:TADRAMS:2010:YA0350).

[142] See Prakken & Spronken 2009, pp. 523-530.

[143] See for an overview of relevant (disciplinary) case law, Prakken & Spronken 2009, pp. 499-503.

that harsh language used when defending a client in court is more often than not a source of annoyance for the court, which is counterproductive to the client's case.[144] Furthermore, everything that has to be said to foster the client's interests is considered necessary.[145]

5. Investigation by the Defence

Criminal procedure should never prohibit contact between lawyers and (potential) witnesses, experts and third parties who could assist in the investigation.[146] As long as the contacts of the lawyer with these persons is in the interest of an effective defence, it should be allowed. The drafters of the Statute therefore propose to remove Rule 16(2) of the general 1992 Code of Conduct.[147] Moreover, in view of the principle of equality of arms, the Government should provide financial resources – if necessary – to facilitate investigation by the defence according to the guidance to these rules.

6. Prevention of Criminalisation of the Lawyer

As long as the lawyer performs his duties according to professional standards, he should never be threatened with criminal prosecution, disciplinary measures or civil proceedings.[148] The lawyer should not be forced to cooperate in any criminal investigation. In this regard, the duty to report suspicious transactions (and thus violating the duty of confidentiality) in the context of possible money laundering activities is a serious cause of concern. Not fulfilling this duty to report, constitutes a criminal offence.[149]

Last, but certainly not least, the Statute urges the Government to ensure that if the accused need to rely on legal aid, remuneration for lawyers is adequate.[150] Adequate remuneration under the legal aid scheme ensures that knowledgeable, specialised criminal

[144] Bannier 2015, p. 108.
[145] Ibid; Prakken & Spronken 2009, p. 492.
[146] Rules 28-31 provide norms to facilitate investigation conducted by the defence.
[147] Disciplinary case law showed that this rule was not very strictly applied, Bannier 2011, p. 107 and § 3.2.4. It should be noted that this rule has been abolished by the revised Code of Conduct 2018, see guidance to Rule 22 of the 2018 Code of Conduct.
[148] Rule 32; see also the Havana Principles (Basic Principles on the Role of Lawyers, adopted at the Eighth Crime Congress in Havana on 7 September 1990); ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*), § 54: "Even so, the threat of an ex post facto review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their client's interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred." In this regard it is also questionable whether 'wasted costs orders' are compatible with European and international standards.
[149] This is further discussed in para. 3.3 of this Chapter, when discussing the rules of conduct concerning the duty of confidentiality.
[150] Rule 33.

defence lawyers are able to take on legal aid cases. Indeed, without proper remuneration lawyers are forced to take on more cases outside the field of criminal law in order to earn a decent fee.

2.4 England and Wales: Organisation of the Legal Profession

For a proper understanding of the relevant regulations in England and Wales, which are divided into regulations for solicitors and for barristers, it is necessary to explain the organisation of the English legal profession. The English legal profession has not always been a divided profession. Originally, there was only one Bar. But in the seventeenth and even the eighteenth century, solicitors were distinguished as a separate profession. From that moment on, barristers no longer engaged directly with their clients. In exchange, barristers were granted exclusive rights of audience in the higher courts and "a virtual monopoly over appointment to the bench".[151] Client management, litigation and police station representation was conducted by solicitors, while advocacy and specialist legal advice was provided by barristers. This division of the profession was considered to be in the public interest, since it would promote specialisation and the 'four eyes principle' would strengthen the quality of legal representation.[152]

2.4.1 Solicitors

Solicitors are usually organised in law firms. They are primarily concerned with all the work outside a courtroom: litigation, conveyancing and client contact. In criminal proceedings, this means that solicitors – or more often designated police station representatives employed by the solicitors' firm – visit the suspect in the police station to offer legal representation, practical assistance and social and emotional support. Because of their close contact with the client, it is evident that it is one of the solicitor's primary tasks to establish a confidential working relationship with the client, based on mutual trust.

The Law Society is the representative body for solicitors in England and Wales. It was founded in 1825 and in 1845 it was established as an independent, private body to serve the affairs of solicitors in England and Wales. The Royal Charter of 1845 still provides the constitutional basis for much of its corporate governance. According to its website, the Law Society:

[151] Zander 2007, p. 773.
[152] Boon 2014, pp. 177-178.

> "[…] [is] the voice of solicitors, [drives] excellence in the profession, [safeguards] the rule of law, [works] to make sure no-one is above the law, [protects] everyone's right to have access to justice".[153]

In order to do so, the Law Society provides training for and advice to solicitors. The Law Society has split its representative and regulatory tasks. The regulatory tasks are placed with the independently organised Solicitors' Regulation Authority (SRA), while the Law Society itself is concerned with the representative tasks.[154]

From October 2011 to November 2019 the most important source of deontological regulation for solicitors was the SRA Handbook. This Handbook was approved by the Legal Services Board (LSB) in 2011 and was implemented on 6 October 2011. Since then it has been regularly updated and the final version (Version 21) was published on 6 December 2018. This version can still be downloaded from the SRA website.[155] On 25 November 2019 the SRA Standards and Regulations came into effect, replacing the SRA Handbook.[156] The new Standards and Regulations are designed to focus on "high professional standards and protecting the public".[157] At the same time, the new Standards and Regulations are simpler and put greater trust in the professional judgment of solicitors. Moreover, the Standards and Regulations allow more freedom of movement to solicitors.

In addition to the SRA Standards and Regulations, the Law Society has published several Practice Notes, providing advice and guidance to solicitors on specific matters. The Practice Notes relating to criminal matters, such as criminal plea in the absence of full prosecution disclosure, communication with prisoners by mobile phone, interpretation and application of the Criminal Procedure Rules, conflicts of interests in criminal cases and the use of interpreters in criminal cases are further discussed in paragraph 2.5.[158]

There is a specialist professional organisation for criminal solicitors: the Criminal Law Solicitors' Association (CLSA). It was founded in 1990 and currently has over 1,500 members. Full membership is open to solicitors practising criminal law. Moreover, anyone employed in a solicitors' firm with a specific interest in criminal law can become an associate member. The CLSA's main activities include responding to consultation papers affecting criminal law solicitors, consulting parties concerned (Government, courts, police) about matters

[153] See: http://www.lawsociety.org.uk/about-us/
[154] See for more information: http://www.sra.org.uk/home/home.page
[155] See: https://www.sra.org.uk/solicitors/handbook/welcome
[156] See: https://www.sra.org.uk/solicitors/standards-regulations/
[157] https://www.sra.org.uk/solicitors/standards-regulations-resources/
[158] The Practice Notes are published on the website of the Law Society: http://lawsociety.org.uk/practice-areas/

regarding the interests of its members, and keeping its members up to date on the latest legal and professional developments.[159]

2.4.2 Solicitor-Advocates

Traditionally, the judge decided who could appear as an advocate in open court. Ever since the Government started to be involved through legislation, barristers and solicitors have been battling over the rights of audience.[160] In 1994, solicitors were granted higher rights of audience and a new profession was born: the solicitor-advocate. Solicitor-advocates are represented by the Law Society and regulated by the SRA. Additionally, they have their own association: the Solicitors' Association of Higher Court Advocates (SAHCA).

The SAHCA was founded in 1994 to represent the interests of solicitor-advocates throughout England and Wales. According to its website, the aim of the SAHCA is to enable its members "to attain the highest ethical and professional standards of advocacy, whilst promoting parity and equality of opportunity with the Bar".[161] The SAHCA organises eight advocacy training sessions each year for solicitor-advocates, using the same training methodology as the Bar. Solicitor-advocates are, just like any other solicitor, bound by the standards and regulations issued by the SRA.[162]

2.4.3 Barristers

Barristers are specialised in providing expert legal advice, advocacy and drafting legal documents. In criminal proceedings, the barrister's role is essentially confined to the trial phase. Traditionally, barristers could only be instructed by a solicitor, which meant that a lay client had to instruct a solicitor first to have access to the legal services provided by a barrister. However, when in 2004 the Public Access Scheme[163] came into force, members of the public could directly instruct barristers without an intermediary. It should be noted though that criminal cases are not very likely to be conducted through the Public Access Scheme. Most criminal cases are funded by legal aid and in that case it is in most cases in the

[159] For more information see: http://www.clsa.co.uk/
[160] See: Zander 2007, pp. 784-795.
[161] See: https://sahca.org.uk/about/
[162] In the new SRA Standards and Regulations higher rights of audience are mentioned throughout. In the last version of the SRA Handbook, however, a separate part was included with regulations regarding obtaining higher rights of audience and the specific outcomes related to the profession of solicitor-advocates. This specific part of the Handbook aimed to ensure the public's confidence in solicitor-advocates' competence.
[163] This scheme is also referred to as 'Direct Access': http://www.directaccessportal.co.uk/

best interests of the client to instruct a solicitor on a public funding basis, instead of instructing a barrister directly on the basis of the Public Access Scheme, because in that case the client will have to pay privately for the Barrister's services.[164]

All barristers in England and Wales have to be a member of an Inn of Court. The Inns have exclusive rights to call men and women to the Bar and have supervision over and provide training facilities for their members. There are four Inns of Court: Gray's Inn, Lincoln's Inn, Middle Temple Inn and Inner Temple Inn, all located in London.[165] The Bar is divided into six regions, called 'Circuits'. The Circuits provide services to the barristers practising in their area, with regard to communication with the courts and the Crown Prosecution Service (CPS) and they organise training and social events for barristers.[166] Traditionally, barristers work as sole practitioners,[167] independent professionals organised in Chambers to share costs of housing and clerical staff. In criminal matters, self-employed barristers can alternate between working for the prosecution and the defence, although of course not in the same case. Nowadays, about 80% of barristers are self-employed, the rest practise as employed barristers in the public and private sectors.[168] Their practice ranges from working in specialist legal departments, advising only the company that employs them to being employed in solicitor firms and advising individual clients. Barristers can also be employed by the CPS or PDS.[169]

Barristers are regulated by the Bar Standards Board (BSB), which was established in January 2006 when the Bar Council split its representative and its regulatory tasks. The BSB operates completely independently from the Bar Council and is responsible for education and training of barristers, ensuring the quality of the services provided by barristers, and setting professional standards, which are laid down in the BSB Handbook. The BSB is also authorised to take disciplinary measures against barristers when they do not comply with the BSB Handbook and to prosecute barristers before the disciplinary tribunal when appropriate.

---

[164] BSB, The Public Access Guidance for Barristers, October 2019, S. 14 (this guidance can be found on the website of the BSB: https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/code.html

[165] More information on the Inns of Court can be found on the website of the Bar Council: http://www.barcouncil.org.uk/about-the-bar/what-is-the-bar/inns-of-court/

[166] For more information on the Circuits: http://www.barcouncil.org.uk/about-the-bar/what-is-the-bar/circuits/

[167] Zander 2007, p. 752.

[168] See: https://www.barcouncil.org.uk/about-the-bar/what-is-the-bar/ and Boon 2014, p. 177 et seq.

[169] For an informative essay on the effects of modernization on the traditional principles underlying the functioning of the English Bar see: Kunzlik, "Rebuilding the Cathedral? – The partnership question and the effect of 'modernisation' on the professionalism and ethics of the English Bar", in: Raes & Claessens 2002, pp. 173 – 199.

The BSB Handbook, which includes the Code of Conduct for Barristers is the most important source of deontological regulations for barristers.[170] This Code of Conduct is divided into core duties and conduct rules. Just like the conduct rules for solicitors, the rules for barristers are defined as outcome-focused regulations. In order to attain these outcomes, several conduct rules are described and accompanied with extensive guidance. Separate from this Handbook, the BSB provides guidelines on specific topics, such as public access, confidentiality and comments to the media.[171] These guidelines do not refer to specific areas of law.

There is a specialist professional organisation for criminal defence barristers: the Criminal Bar Association (CBA). It has no regulatory powers and exists primarily to "represent the views of practising members of the criminal bar in England and Wales".[172] The CBA is governed by the 'Committee', which is chaired by a Queen's Counsel (QC). The chairman holds office for one year. Although the CBA is open to barristers who work for the prosecution and the defence, the CBA tends to be dominated by criminal defence lawyers. Membership of the CBA is open to barristers (private practice and employed) and pupil barristers and anyone who is participating in the Bar Professional Training Course (BPTC, which is a postgraduate course for law graduates who wish to become barristers). The main purpose of the CBA is to inform its members about a number of criminal law related issues. To reach this aim, the CBA organises many events informing barristers about specific issues related to criminal law. Furthermore, it manages continuing professional development courses specifically aimed at criminal law and general skills needed for criminal advocacy.

2.4.4 Qualification as a Criminal Defence Lawyer

For centuries, English lawyers were prohibited from participating for the defence in criminal proceedings.[173] Since around 1730, the profession of defence counsel was introduced, but only few accused had their case represented by counsel.[174] Moreover, counsel had to conduct representation under certain restrictions, such as not being allowed to address the jury.[175] In the following decades the role of defence counsel, however, expanded gradually

[170] Version 4.3 of the BSB Handbook came into force on 15 October 2019 and can be downloaded from the BSB website: https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/the-handbook-publication/

[171] These guidelines can also be found on the BSB website: https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/

[172] See: https://www.criminalbar.com/

[173] Langbein 2003, p.10.

[174] Langbein 2003, pp. 168-169.

[175] Langbein 2003, p. 296.

and trial eventually became truly adversarial with counsel for the prosecution and counsel for the defence.

The legal profession in England and Wales providing representation in criminal proceedings is divided into four separate branches: chartered legal executive fellows,[176] solicitors, solicitor-advocates and barristers. Traditionally, these professions operate quite separately within the criminal justice process. However, it has become increasingly popular to set up business structures in which the professions work together (Alternative Business Structures – ABS). This development is the consequence of the introduction of the Legal Services Act in 2007.[177] There are significant differences in training requirements for the separate professions (legal executives[178], solicitors[179], solicitor-advocates[180] and barristers[181]) while at the same time the qualifications that are the result of this training are virtually identical. In an attempt to streamline the qualification of professionals who wish to do criminal work, the Law Society runs the Criminal Litigation Accreditation Scheme, which consists of the Police Station Qualification and the Magistrates' Courts Qualification.[182]

In 2014, Sir Bill Jeffrey published his review of independent criminal advocacy in England and Wales.[183] In his review Jeffrey addressed the quite significant diversity in training requirements to become a qualified advocate in criminal proceedings within the English legal profession. Moreover, according to most of the judges he interviewed, it seemed to be common practice among advocates to act beyond their level of competence.[184] The lack of a profound quality assurance system for advocacy was already acknowledged in 2006 by Lord Carter in his report on legal aid reforms.[185] Consequently, in September 2013, legal professional regulators (BSB, SRA and ILEX Professional Standards) issued the Quality Assurance Scheme for Advocates (QASA) Handbook for criminal advocates in order to ensure

[176] Chartered Legal Executives are authorised lawyers who often specialise in a certain area of law. They always work under supervision of an authorised person, for example, a solicitor. For more information on Chartered Legal Executives visit: https://www.cilexregulation.org.uk/

[177] Legal Services Act 2007, Ch. 29, Part 5.

[178] For more information on the training to become a chartered legal executive visit: http://www.cilexlawschool.ac.uk/prospective_students/qualify_as_legal_executive/introduction

[179] For more information on training to become a solicitor visit: http://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/

[180] For more information on how to obtain higher rights of audience visit: http://www.sra.org.uk/solicitors/accreditation/higher-rights-of-audience.page

[181] For more information on how to qualify as barrister visit: https://www.barstandardsboard.org.uk/training-qualification.html

[182] For more information on the Criminal Litigation Accreditation Scheme see paragraph 3.1.4 below.

[183] Sir Bill Jeffrey, *Independent criminal advocacy in England and Wales,* review May 2014.

[184] Jeffrey 2014, § 2.7.

[185] Lord Carter, *Legal aid – A market-based approach to reform,* July 2006: "A proportionate system of quality monitoring based on the principles of peer review and a rounded appraisal system should be developed for all advocates working in the criminal, civil and family courts." (p. 14, recommendation 5.3).

that criminal advocates practise at a level they can actually handle. Although QASA has never been actually implemented,[186] the scheme will be briefly outlined to illustrate the delicate balance that has to be struck when designing quality assurance schemes.

QASA, which was intended to apply to all advocates who wish to do criminal advocacy in courts in England and Wales, aimed to protect the public against advocates who do criminal advocacy beyond their level of professional competence. It was a precautionary scheme, based on accreditation according to several levels. Accreditation was to be provided either on the basis of assessments by specific assessment organisations (for non-trial lawyers) or on the basis of judicial assessment (for trial lawyers). According to the scheme each criminal advocate had to be assessed by their approved regulator before he could be fully accredited at the appropriate level. Although the BSB as the regulating authority for barristers approved QASA, several barristers practising criminal advocacy applied for judicial review of the QASA with the divisional court all the way to the Supreme Court to obtain a ruling on the lawfulness of the LSB's decision to approve and implement QASA. Their main concern with QASA was the element of judicial assessment, because it could be detrimental to the criminal advocates' professional independence.[187] Other elements of concern in relation to the legal profession's independence were that the scheme would operate exclusively in the context of criminal trials, an area of law where the advocate's independence is put under quite high pressure already even without judicial assessment. Moreover, judicial assessment would have to take place in two or a maximum of three consecutive effective trials, which means that the scope for assessment is quite narrow, which considerably increases the significance of each assessment. Additionally, the assessment criteria are quite subjective and very detailed. Lastly, the advocate has to inform the trial judge before the trial begins that he wants to use the trial as part of the assessment under the QASA, which might have a chilling effect on the lawyer's independence and partiality. Despite the Bar's efforts, the High Court[188] as well as the Supreme Court[189] ruled that QASA was lawful. Although the High Court ruled that QASA was lawful, it did suggest some changes which might improve the scheme

[186] In November 2017 the BSB announced that QASA no longer fit the BSB's regulatory approach and that it would not be implemented. The other regulatory bodies welcomed the BSB's decision. See *inter alia*, The Law Society Gazette, 29 November 2017: "Quality scheme for criminal advocates finally abandoned". (https://www.lawgazette.co.uk/practice/quality-scheme-for-criminal-advocates-finally-abandoned/5063900.article). See also the Law Society's response to the SRA consultation on advocacy standards, November 2019 (https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/sra-assuring-advocacy-standards/) and a press release of the Bar Council on 29 November 2017 (https://www.barcouncil.org.uk/media-centre/news-and-press-releases/2017/november/demise-of-qasa-bar-council-responds/).

[187] Jeffrey does not share their concerns, see Jeffrey 2014, p. 6: "I am more inclined than some to have confidence that judges will in practice be able to distinguish poor advocacy from the carrying out of wrong-headed client instructions."

[188] *Lumsdon and others v Legal Services Board* [2014] EHWC 28 (Admin), § 135.

[189] *R (on the application of Lumsdon and others) v Legal Services Board* [2014] EWCA Civ 1276, § 112.

and reduce the concerns raised by the BSB.[190] And also the Supreme Court acknowledged that QASA was a "controversial scheme on which opinions are sharply divided" and emphasised the intention to review the scheme within two years.[191]

Quality assurance through QASA illustrates the division of loyalty of the criminal defence lawyer. The lawyer has to support his client's interests, but also may be concerned about his own interests regarding the accreditation and at the same time owes an ever-increasing duty to the proper administration of justice embodied by the overriding objective of the Criminal Procedure Rules.[192] Although the courts in all instances ruled that QASA did not infringe on the professional independence of criminal defence lawyers, it remained questionable how QASA would work out in practice. As said, QASA was never implemented. Yet, the quality of criminal advocacy remains a delicate issue. Recent research among Circuit and High Court judges showed that although the majority of judges consider criminal advocacy to be of good quality in general, that quality seemed to be highly dependent on the professional background of the advocate (solicitor-advocates and in-house barristers were considered to be less competent than independent members of the Bar). Moreover, judges showed concern about the negative effect of declining levels of legal aid remuneration on the quality of criminal advocacy.[193]

2.4.5 Public Defender Service (PDS)

In 2001 a Public Defender Service (PDS) was established, which is funded by the Legal Aid Agency. It provides an independent criminal defence service to suspects and accused throughout criminal proceedings. The PDS employs solicitors, solicitor-advocates and barristers. PDS solicitors provide legal assistance free of charge to suspects who are detained at police stations. PDS advocates (barristers and solicitors with higher rights of audience) are independently organised and can be instructed by any solicitor firm in England and Wales. They cover all areas of criminal law, but specialise in serious and complex criminal cases.[194]

Professionals who are employed by the Public Defender Service (PDS) have to not only take into account the code of conduct issued by their regulators, but also adhere to the specific PDS Code of Conduct (latest version dated March 2014).[195] According to § 1.3 of this

[190] *Lumsdon & Ors v Legal Services Board* [2014] EHWC 28 (Admin), § 136.
[191] *R (on the application of Lumsdon and others) v Legal Services Board* [2014] EWCA Civ 1276, § 112.
[192] See para. 2.5.1 of this Chapter for more information on the Criminal Procedure Rules.
[193] Hunter et al. 2018, p. IV.
[194] For more information on the organisation of the PDS visit their website: https://publicdefenderservice.org.uk/
[195] This PDS Code of Conduct can be found on the website of the PDS: http://publicdefenderservice.org.uk/advocates/about-us/ and is discussed further in para. 2.7 of this Chapter.

Code, it must be "interpreted in a way which is compatible with the codes of other professional bodies". The PDS Code of Conduct is discussed further in paragraph 2.7.

2.4.6 Centralised Regulation of the English Legal Profession

Traditionally, all the English legal professions were regulated by their own regulatory bodies (self-regulation). As described above each profession is still separately organised. Yet a supervisory regulator, the Legal Services Board (LSB), was set up to streamline regulation and make it more efficient and less complex.[196] The LSB is accountable to Parliament and sponsored by the Ministry of Justice.[197] With the introduction of the LSB, consumer interests have become the central focus of the legal services market. The functioning of the LSB is however subject to much criticism from the legal profession.[198] Particularly concerning the fact that the LSB seems to be more focused on accessibility of the legal profession for consumers rather than serving the best interests of the legal profession. It should be noted that the LSB does not deal with complaints about lawyers, this is still the task of the regulatory bodies of the separate legal professions. The LSB is primarily concerned with overseeing these regulators and to ensure that the public interest is served.

At the same time a more centralised system of consumers' complaints handling was introduced,[199] so that it would be less difficult for consumers to file complaints. Moreover, the regulatory bodies of the individual professions would not be burdened anymore with all complaints, which means that they would have more room to deal with serious cases of professional misconduct. In sum, regulation of the English legal profession has been centralised and streamlined over the past few years.

---

[196] See Clementi 2004, p. 2, 57. Clementi refers to his Consultation Paper: "Review of the Regulatory Framework for Legal Services in England and Wales, A Consultation Paper", 8 March 2004. The LSB was created by the entry into force of the Legal Services Act (LSA) in 2007.

[197] LSB Framework Document of June 2011, which details the relation between the Ministry of Justice and the LSB: http://www.legalservicesboard.org.uk/about_us/lsb_framework_document/index.htm

[198] See the Reponses to the Ministry of Justice's Triennial Review of the LSB of the SRA, the Bar Council and CILEx, March/April 2012; Ministry of Justice – Call for evidence on the regulation of legal services in England and Wales, Solicitors Regulation Authority response, September 2013, s. 8.5; Bar Council response to the Review of the Legal Services Regulatory Framework consultation paper, September 2013, p. 7-8.

[199] The OLC still functions as the Board of the Legal Ombudsman. The OLC consists of seven members, including the chair, four of whom are lay members (http://www.legalombudsman.org.uk/about-us/); Slapper & Kelly 2014, p. 706; Seneviratne 2015, p. 1.

2.5 England and Wales: Law Society's Practice Notes

The Law Society advises solicitors through 'Practice Notes', which represent the views of the Law Society on good practice in particular areas of law and practice.[200] Solicitors are urged to follow the guidelines issued in these Practice Notes, which also makes it easier to account for their actions to oversight and regulatory bodies. The Law Society issued a number of Practice Notes that are specifically aimed at criminal defence. These Practice Notes operate alongside the general SRA code of conduct and provide guidance to criminal defence solicitors on how to implement the regulations from the general SRA code of conduct on legal representation of suspects and accused persons in criminal proceedings.

2.5.1 Criminal Procedure Rules 2015: solicitors' duties

Before discussing the Practice Note concerning solicitors' duties under the Criminal Procedure Rules,[201] some general remarks have to be made about the Criminal Procedure Rules (CrimPR), since they have a significant impact on the work of criminal defence solicitors. The Criminal Procedure Rule Committee[202] established the CrimPR to govern practice and procedure in criminal courts in England and Wales. The Committee issued the first set of CrimPR in 2005 with a view to:

> "[…] securing that the criminal justice system is accessible, fair and efficient, and that the rules are both simple and simply expressed"[203]

and restates them every year.[204] Until the adoption of the CrimPR, various rules of court were spread over different regulations. The CrimPR bring them together in one place and as such important steps towards a new, consolidated code of criminal procedure are taken. Until the creation of the CrimPR, criminal procedure was considered to be ineffective and inefficient. Courts would have to change the way in which criminal cases were managed to avoid

[200] The Practice Notes referred to in this paragraph can be found on the website of the Law Society: http://www.lawsociety.org.uk/advice/practice-notes/ and can be requested from the author.
[201] In this paragraph reference is made to the version of this Practice Note "Criminal Procedure Rules 2015: solicitors' duties" as issued on 12 December 2019.
[202] The Criminal Procedure Rule Committee was established under s. 69-74 of the Courts Act 2003.
[203] Explanatory Memorandum to the Criminal Procedure Rules 2005, 2005 No. 384 (L.4).
[204] The latest version of the CrimPR entered into force on 1 April 2019 (https://www.justice.gov.uk/courts/procedure-rules/criminal).

ineffective and wasted hearings. The CrimPR aim to contribute to this change in culture, which is why compliance with the CrimPR is not merely advisable but compulsory.[205]

The overriding objective – managing criminal proceedings

The change in culture can be seen in the introduction of the overriding objective "that criminal cases be dealt with justly".[206] This includes, for example, that only the guilty are convicted, the prosecution and the defence are dealt with fairly, and the rights of the accused are recognised. Courts are given explicit powers to actively manage the preparation and conduct of criminal cases and all participants in criminal proceedings are obliged to assist the court in pursuing the overriding objective.[207] This means that each participant in criminal proceedings should:

> "[…] at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective."[208]

This rule confronts solicitors with an ethical dilemma: how should they balance the duty to pursue the overriding objective as placed upon them by the CrimPR with their duty to act in the best interests of their clients, which is one of the SRA Principles?[209] When two or more principles conflict

> "[…] those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests."[210]

According to the SRA, solicitors will have to inform their clients that under certain circumstances their professional duties to the Court may outweigh their duties to their clients. The Practice Notes on the CrimPR 2015 refer to this ethical dilemma as 'divided

[205] (Former) Senior Presiding Judge of England and Wales, Lord Justice Leveson, *Essential Case Management: Applying the Criminal Procedure Rules*, December 2009 (https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf)
[206] CrimPR, Rule 1.1.
[207] CrimPR, Rule 1.1 § 2.
[208] CrimPR, Rule 1.2 § 1 (c).
[209] SRA Principles 2018, Principle 7.
[210] SRA Principles 2018, Introduction.

loyalty'. It explains the extent of the duties and burdens arising from the CrimPR and advises criminal defence solicitors on identifying and dealing with the ethical issues that might be caused by the CrimPR. Solicitors are officers of the court and therefore always have a duty to the court.[211] This duty:

> "[…] extends to the whole way in which the client's case is presented, so that time is not wasted and the court is able to focus on the issues as efficiently and economically as possible."[212]

At the same time the solicitor has duties to his client.[213] The Practice Notes give some examples of when these duties might conflict in criminal proceedings:

1. When a solicitor has to withdraw from acting for one or more clients in case a conflict of interests arises between those clients in the course of proceedings, this will inevitably cause inconvenience to the court and possibly leave other parties with consequential financial loss.
2. When a solicitor has factual information, which is of crucial importance to a party to the proceedings, and refuses to produce this information on request by the court.
3. When a solicitor provides advice at a police interview, which is later viewed by the court – in changed circumstances – as 'unhelpful', 'obstructive' or 'ill-advised'.

It is very likely in all of these situations that the court considers itself to be entitled to some explanation from the solicitor of his conduct. According to the Practice Notes, the court should, however, understand that the duty of confidentiality[214] often prevents a solicitor from providing an explanation, because in most cases the information sought by the court will be privileged.[215] This means that the solicitor is not allowed to share this information

[211] SRA Principles 2018, Principle 1 provides: "You act in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice."
[212] Lord Hope in *Arthur J.S. Hall and Co v Simons* (AP) [2000] UKHL 38, [2002] 1 AC 615, p. 715.
[213] SRA Principles 2018, Principle 7 provides: "You act in the best interests of each client."
[214] SRA Code of Conduct 2018, Chapter 6 on confidentiality and disclosure.
[215] Practice Note, paragraph 4.2. This is confirmed by Lord Justice Rose in *R v G & B* [2004] EWCA Crim 1368: "We think it right, both in principle and pragmatically, that whether a solicitor or barrister can properly continue to act is a matter for him or her, not the court, although of course the court can properly make observations on the matter. … Absent exceptional circumstances, such as an obvious attempt by a defendant to abuse the system by repeated applications, we think it is unlikely that, if leading counsel tells a judge that he is embarrassed to continue acting, the judge will not permit a change of representation." (para 14)

without his client's prior consent.[216] In these circumstances it will have to suffice that the solicitor only informs the court of his decision, without providing a detailed reasoning that might involve disclosing privileged information.

The Practice Note gives some more examples of common situations in which the overriding objective to assist the court in the management of the case can come into conflict with the professional obligations towards the client:[217]

1. "There is an issue, or deficiency in the prosecution case, on which the defendant wishes to rely, but he or she does not wish to give the court advance notice of this." According to the CrimPR the accused has to provide a defence statement at the earliest possible opportunity,[218] even if this means that technical defences are lost.
2. "The defendant is advised there is no defence in law, but states that he or she nevertheless intends to plead not guilty." The accused is entitled to put the prosecution to proof, however he cannot set up a positive case. According to the Practice Notes the defence statement should only state that the accused does not admit the offence, that he will not advance a positive case, but that he wishes to put the prosecution to proof.
3. "There is a defence available to the defendant, but he or she refuses to permit you to pass the information to the court." According to the CrimPR, the solicitor is actually obliged to pass any relevant information to the court; however, the Practice Notes advise that the solicitor should inform the court that the accused has not given permission to disclose the defence.

Defence Statements

Since 2003, the defence has an independent and far-reaching duty to disclose details of its case in a "defence statement".[219] According to the Criminal Procedure and Investigations Act 1996, a defence statement is:

> "[…] a written statement –
>
> a. setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
> b. indicating the matters of fact on which he takes issue with the prosecution,
> c. setting out, in the case of each such matter, why he takes issue with the prosecution, and

[216] SRA Code of Conduct 30 May 2018, (6.3): "You keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents."
[217] Practice Note, paragraph 4.5.2.
[218] See also para. 2.5.2 of this Chapter on criminal pleading in the absence of full disclosure.
[219] CPIA 1996, s. 4.

d. indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose."[220]

Additionally, if the defence requests the prosecution to disclose specific materials, the defence will have to supply a full defence statement motivating exactly which material the defence wishes the prosecution to disclose and why the defence has reason to believe that the prosecution is in possession of this material.[221] Or as Lord Bingham puts it:

> "The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good." (paragraph 35)[222]

These defence statements are not only used by prosecutors to determine which material will be disclosed to the defence, they are also used to give direction to the criminal investigation.[223] Particularly in cases that involve an extensive amount of unused material,[224] the defence statement is very important because it may help the prosecution and the court to identify which material needs to be disclosed. This, however, presupposes that the defence knows what the unused material actually consist of.[225] Moreover, the accused is confronted with other dilemmas. Although the accused would benefit from further investigation into possibly exculpating lines of enquiry, it is not always clear to the accused whether a certain line of enquiry will actually have an exculpating result. And if he discovers an evidential gap in the prosecution's case, which he could use to his benefit, he would not be very likely to share this knowledge at the earliest opportunity. According to the disclosure rules,[226] the accused, however, must share this knowledge with the prosecution in his

[220] CPIA 1996, s. 6A (1).
[221] Magistrates' Court Disclosure Review, May 2014, § 105; CrimPR 2017, s. 15.5(3); Attorney General's Guidelines on Disclosure, December 2013, § 9.
[222] *R v H* [2004] UKHL 3; [2004] 2 AC 134.
[223] Attorney General's Office, *Attorney General's Guidelines on Disclosure – For investigators, prosecutors and defence lawyers,* December 2013, § 31: "If the defence statement does point to other reasonable lines of enquiry, further investigation is required and evidence obtained as a result of these enquiries may be used as part of the prosecution case or to rebut the defence."
[224] Unused material is case material gathered during an investigation, which does not form part of the prosecution's case, because it does not help prove the accused's guilt (Magistrates' Court Disclosure Review, May 2014, § 26). Traditionally, the duty to disclose has been a continuing duty for the prosecution, regardless of the provision by the defence of a statement (Magistrates' Court Disclosure Review, May 2014, § 32 and CIPA 1996, s. 3(1)).
[225] Attorney General's Office, *Attorney General's Guidelines on Disclosure – For investigators, prosecutors and defence lawyers,* December 2013, §§ 41-42.
[226] See: CPIA 1996, Magistrates' Court Disclosure Review (May 2014) and the CPS Disclosure Manual.

defence statement. If his defence statement is incomplete or not submitted within the statutory time limits, he might be sanctioned. The court for example can declare certain evidence inadmissible or instruct the jury that adverse inferences can be drawn if the accused relies on evidence which has not previously been mentioned in the defence statement.[227] Moreover, the prosecution can cross-examine the accused on the defence statement and confront him with any discrepancies between the defence put forward at trial and the defence set out in his defence statement.[228]

In the Practice Note on the CrimPR, solicitors are reminded that the overriding objective to deal with criminal cases justly also includes recognising defence rights, such as the right to be presumed innocent and not to incriminate oneself. These rights cannot be set aside only to contribute to case management.[229]

Wasted Costs Orders

The court has the possibility to issue a "wasted costs order" when negligence on the part of the defence has been so serious that as a result costs have been incurred by a party to the proceedings. It should be noted that a wasted costs order strictly speaking is not a punishment, but merely a compensatory measure. This means that wasted costs orders may only be issued if due to an "improper, unreasonable or negligent act or omission"[230] costs had to be incurred by a party to the proceedings. The court should, however, take into account that professional privilege might limit the solicitor in responding to the wasted costs order. Such an order can therefore only be issued if the court is satisfied that the lawyer could not have said anything to resist the order, even if he had not been constrained by his legal professional privilege and that it is "in all circumstances fair to make the order".[231]

2.5.2 Criminal Plea in the Absence of Sufficient Prosecution Case Information

In December 2009, Lord Justice Leveson (then Senior Presiding Judge for England and Wales) published the "Essential Case Management: applying the Criminal Procedure Rules".[232] This document serves as guidance to courts on how to implement the CrimPR and to explain what

[227] Practice Note, paragraph 4.5.4.
[228] Attorney General's Office, *Attorney General's Guidelines on Disclosure – For investigators, prosecutors and defence lawyers,* December 2013, § 32.
[229] Practice Note, paragraph 4.2.
[230] Practice Note, paragraph 5.4.
[231] House of Lords in *Medcalf v Mardell* [2002] UKHL 27, [2003] 1AC 120, [2002] 3 All ER 721 (27 June 2002), Lord Bingham (paragraph 23).
[232] This publication can be downloaded from the website of the Courts and Tribunal Judiciary: (https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf

is meant by 'actively managing each case', as is stated in the overriding objective of the CrimPR. The document raised serious concerns among criminal defence lawyers, particularly due to the following regulation:

> "At every hearing (however early):
> – Unless it has been done already, the court **must** take the defendant's plea *[Crim PR 3.8(2)(b)]*. This obligation does not depend on the extent of advance information, service of evidence, disclosure of unused material, or the grant of legal aid.
> – If the plea really cannot be taken (exceptions are rare and must be strictly justified) or if the alleged offence is indictable only[233], the court **must** find out what the plea is likely to be *[Crim PR 3.8(2)(b)]*."

The lawyers' concern focused on the fact that it is very difficult, if not impossible, to advise the client properly on taking any plea without full disclosure of relevant case material (which is often the case at early stages of the proceedings). Consequently, the Law Society issued a Practice Note on taking criminal pleas in the earliest stages of proceedings, when full prosecution disclosure is absent.[234]

Taking a plea is quite a delicate issue, because there is a lot at stake for the accused. Accused are entitled to significant reductions in sentencing if they enter a plea of guilty in the earliest stages of proceedings: the earlier the guilty plea, the more significant the reduction in sentencing.[235] However, without sufficient knowledge of the prosecution's case, it might just be a disadvantage to plead guilty. In such cases it might be wiser to plead not guilty and to see whether the prosecution is able to prove the accused's guilt. A plea of not guilty, however, comes with the risk of a higher sentence than the accused would have had, had he pleaded guilty at the beginning of the proceedings (provided of course that the court finds the accused guilty).

Thus the solicitor is faced with a serious ethical dilemma: providing adequate advice on taking a plea without sufficient information about the prosecution's case is virtually impossible. According to the Practice Notes, the solicitor meets his professional obligations if he – at all times – makes both the court and the client aware of any problems he is facing in the course of advising on taking a plea: the solicitor "should both advise the client about the situation and inform the court of the predicament you face due to the lack of

[233] An "indictable-only offence" is usually a rather serious offence, such as murder or rape, and can only be tried at the Crown Court on indictment.
[234] In this paragraph reference is made to the latest version of this Practice Note "Criminal plea in the absence of sufficient prosecution case information", which was issued on 21 December 2015.
[235] For more information on settling the case, see para. 3.2.2 of this Chapter.

information"[236] to attempt to secure maximum reduction in the sentence upon a future plea of guilty.

As soon as the missing information is available, the solicitor should re-advise the client in light of the new information, take urgent instructions on his plea of guilty or not guilty and notify the court as soon as possible. In doing so, according to the Practice Note, the solicitor should be regarded as fulfilling his obligations under the CrimPR (he has actively assisted the court in managing the case) and it will help him protect the accused's rights to still receive appropriate credit for an early plea of guilty.[237] Thus, according to the Practice Note, the solution to the ethical dilemma lies in a very active professional attitude of the lawyer, the compliance of the police and judicial authorities in making the necessary information available as soon as possible, as well as the willingness of the court to not hold the accused accountable for a delayed plea of guilty due to the lack of full disclosure at the earliest stages of proceedings.

2.5.3 Conflicts of Interests in Criminal Cases

Chapter 6 of the SRA Code of Conduct deals with conflicts of interests. In principle, the criminal defence lawyer is not prohibited to act for two or more accused in the same case. According to the SRA Code of Conduct 2018, the solicitor should not act if his own interests conflict with those of the (potential) client or if there is a (potential) client conflict.[238] There are some exceptions to this main principle. A lawyer can act, despite an existing client conflict when clients have a "substantially common interest" or they are "competing for the same objective". When the lawyer decides to take on representation of co-accused under such exceptional circumstances, he should explain the risks of such representation carefully to all clients and make sure that all clients confirm their wish in writing to be jointly represented.[239]

Determining (potential) client conflicts

The question remains how the criminal defence lawyer should determine whether there is a (potential) client conflict and if there is one, how he should decide whether this conflict is significant enough to refuse instructions or withdraw from the case. The Practice Note "Conflicts of interests in criminal cases"[240] takes the following starting point. It is the solicitor's fundamental professional obligation to act in the best interests of each individual client. The simplest way to determine whether there is a (potential) client conflict, is asking

[236] Practice Note, paragraph 3.1.
[237] Practice Note, paragraph 3.2.
[238] SRA Code of Conduct 2018, paragraphs 6.1 and 6.2.
[239] See SRA Code of Conduct 2018, paragraph 6.2.
[240] In this paragraph reference is made to the version of this Practice Note as issued on 13 January 2016.

the clients if they are aware of such a conflict. If they indicate that there is none, the solicitor will still have to ask himself whether he feels that there are any constraints in advising one client when this might be detrimental to the other client's case. Such constraints for example arise when it would be in the best interests of client A to give evidence against client B.[241] If these constraints exist or if the solicitor feels that there is a significant risk of such constraints arising, the solicitor should only accept instructions of one accused in the case (or if already acting, should cease acting for all accused).

At all times it is important for the solicitor to do a conflict check at the earliest opportunity; this might proof to be difficult if for example taking instructions at the police station outside office hours, because then it may be difficult to check whether a colleague at the firm is already representing another accused or victim in the same or a related matter. The best way to determine at the police station whether there is a (potential) client conflict between co-accused is by interviewing the clients separately and to receive as complete instructions as possible from the first client, before moving on to interviewing the other clients. In any case, the solicitor should never have police refuse him access to more than one client in the same case. It is the solicitor who decides whether there is (potential) client conflict, not the police. And he can only make this decision after having interviewed all clients. The Practice Note also gives some examples of indicators to spot a client conflict, such as differing accounts of important circumstances of the alleged offence, likely changes of a plea, clear inequality between the co-accused, suggesting that one client is acting under influence of the other or co-accused are related or living together.[242]

While it is already quite difficult to spot an existing client conflict, potential client conflicts are even harder to assess. The Practice Note gives one example relating to mitigation. In the example a solicitor is acting for two accused, who both plead not guilty. In the event that they are both found guilty, mitigating fully and freely for both clients might proof to be difficult when one of the accused has a long list of convictions, while the other has a relatively clean record, was led astray or pressurised into committing the crime and is asking the solicitor to bring this forward in mitigation. The solicitor will not be able to do so, without prejudicing the other accused and should therefore not accept instructions for both from the outset to avoid being confronted with the described situation in the future.

Client conflict arising during the course of representation

When the solicitor is representing co-accused in the same case and a client conflict arises during the course of proceedings, he will have to determine whether it is appropriate to continue representation for one client or whether all accused need to instruct new firms. This will depend on whether the solicitor holds relevant confidential information from the

[241] Other examples are provided in the Practice Note, paragraph 2.1.
[242] Practice Note, paragraph 2.3.1.

departing client, which should be used in the case of the retained client. If this is the case, the solicitor cannot keep representing one accused, but has to cease acting for all accused.

Defending co-accused in legal aid cases

When defending co-accused in a legal aid case, the solicitor might be confronted with some additional challenges. In legal aid cases, the starting point is that one solicitor will assist all co-accused in one case, except for situations where there is conflict of interests between the accused.[243] The economic benefits of such a regulation are obvious, but at the same time trigger police and courts to pressure solicitors into continuing representation, despite obvious client conflicts. Such pressure is mainly driven by economic motives, because any delay will have negative financial consequences and cause inconveniences, such as rescheduling police interrogations and court hearings. The solicitor has to be aware of this and should always remind police and the court of his professional obligations, prescribing that he is not allowed to continue representation of co-accused if there is a significant risk of a client conflict. Moreover, the solicitor is not obliged to answer any questions from the court about the reasons for withdrawal, as long as this information is privileged.

2.5.4 Communication with Prisoners by Mobile Phone

The use of illicitly possessed mobile phones to make calls from prison has become a serious issue. According to the Prison Act 1952 it is an offence to possess and use a mobile phone while in prison without authorisation:

> "(1) A person who, without authorisation […] (b) transmits, *or causes to be transmitted*, any image or any sound from inside a prison by electronic communications for simultaneous reception outside the prison, is guilty of an offence." [244] [emphasis added, MA]

This also includes persons outside a prison deliberately making calls to a prisoner on a mobile telephone, provided that this prisoner also answers this telephone call and vice versa. The Law Society therefore issued a Practice Note "Communication with prisoners by mobile phone"[245] warning criminal defence solicitors of being complicit with this offence if they communicate with detained clients using a mobile phone.

The starting point of the Practice Note is that the solicitor has to ensure that he does not commit an offence. Therefore criminal defence solicitors are advised to never conduct

[243] Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013, s. 13.
[244] Prison Act 1952, s. 40D.
[245] In this paragraph reference is made to the version of this Practice Note as issued on 5 December 2019.

telephone conversations with imprisoned clients who use a mobile telephone number. When the solicitor establishes that he is receiving a telephone call from an imprisoned client from a mobile phone, he should inform the client that he is committing an offence and that he or his staff will not accept calls in these circumstances, after which he will have to immediately terminate the conversation. It is also advised to warn the client that repeated calls using a mobile phone could result in the termination of the representation, since the client is putting the solicitor in a position where he might be considered complicit in the commission of a criminal offence.[246]

2.5.5 Defence Witness Notices

Article 6C of the Criminal Procedure and Investigations Act 1996 provides:

> "The accused must give to the court and the prosecutor a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial and, if so (a) giving the name, address and date of birth of each such proposed witness, or as many of those details as are known to the accused when the notice is given; […]"

This obligation applies both in Magistrates' and Crown Courts. The notices have to be provided at the earliest possible moment[247] and at least within 14 days of service of initial prosecution disclosure. If a case were to be send to the Crown Court, the 'earliest possible moment' would be at a Plea and Case Management Hearing (PCMH).[248] Probably, the accused will have in mind one or more persons who could act as witnesses on his behalf and can provide the solicitor with the details of these persons. However, as the Practice Note "Defence witness notices"[249] provides:

---

[246] Practice Note, paragraph 2.2.

[247] See CrimPR Parts 1.2, 3.2 and 3.3.

[248] A Plea and Case Management Hearing (PCMH) is the first hearing at the Crown Court (there is no PCMH at Magistrate's Courts), at which the defendant has to enter his plea. If he pleads guilty, sentencing may take place immediately. If he pleads not guilty, the prosecution and the defence are expected to inform the court of any relevant issues in the case, for example witness notices, exhibits, formal admissions, any points of law. This way the court can make an estimation of the length of the trial. See also *R v Ensor* [2009] EWCA Crim 2519, § 30 on the service of expert evidence: "the effect of the Criminal Procedure Rules Parts 1.2 and 3.3 together is that it is incumbent upon both prosecution and defence parties to criminal trials to alert the court and the other side at the earliest practical moment if it is intending or may be intending to adduce expert evidence. That should be done if possible at a Plea and Case Management Hearing. If it cannot be done then it must be done as soon as the possibility [of calling expert evidence] becomes live."

[249] In this paragraph reference is made to the version of this Practice Note as issued on 5 December 2019.

> "[…] to merely have been supplied with the name and address of a possible witness is not enough – you should have taken a statement from the witness." [250]

In order to properly advise the accused on calling these persons as witnesses for the defence, it is important to establish what those potential witnesses will testify and whether this will be in favour of the accused's case. In practice, the solicitor thus will have to take witness statements from all potential defence witnesses prior to the first appearance in court. According to the regulations mentioned above, the accused is obliged to provide a defence witness notice when he wishes to call witnesses for his defence. Failure to do so (in time), may lead to adverse comments from the court and prosecution; witnesses' credibility might be called into question during cross-examining or the court may file a wasted costs order against the accused and/or the solicitor. Providing defence witness notices in time is therefore of crucial importance to the position of the accused and the Practice Note urges solicitors to carefully advise and assist the accused in this regard.

Attending witness interviews

The Practice Note also provides guidance on the duties to clients and witnesses with regard to witness interviews.[251] A solicitor can attend a witness interview either as the representative of his client or on behalf of the witness who is interviewed. The solicitor should always ensure that all participants in the interview know who he is representing. It is possible for the solicitor to represent a witness, when this witness is giving statements in the case of the solicitor's client, provided the client consents to this.[252] The solicitor can also attend the witness interview as the accused's representative, in which case he will be merely an observer. However, this does not have to prevent him from intervening if it is clear that the witness is bullied by the interrogating officers or if they pose leading questions to the witness. Still, observing the interview can be very informative, since it enables the solicitor to verify whether the witness is telling the same story to the police as he was telling the solicitor while he was taking the witness' statement. If the solicitor attends the witness interview as the witness's representative he is able to actively intervene, to prevent the witness from being pressurized into answering questions.[253]

[250] Practice Note, paragraph 2.4.1.
[251] Practice Note, paragraph 3.
[252] Practice Note, paragraph 3.2: "You should carefully consider whether a conflict of interest may arise that would prevent you from representing the witness at their interview in a case where you act for the defendant."
[253] Attending witness interviews as the witness's representative is usually not covered by the legal aid scheme (Practice Note, paragraph 4.2).

2.5.6 Defendants' Costs Orders

According to Schedule 7 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 a non-legally aided accused who has been acquitted or succeeded in appeal has the opportunity to apply for recovery of his legal costs. These regulations only apply to cases commenced on or after 1st October 2012[254] and recovery is limited to legal aid rates. The Practice Note on defendants' costs orders[255] is very technical and it would go beyond the purpose of this research to detail the guidance provided in this Practice Note. It suffices to say that the solicitor is urged to properly advise and inform (in writing) his client on the limited possibility of recovering legal costs upon acquittal.

2.5.7 Police Interviews involving Sign Language Interpreters

It is common practice in England and Wales to audio-record police interviews with suspects.[256] The Practice Note "Police interviews involving sign language interpreters"[257] reminds criminal defence solicitors who represent a deaf accused to ensure that police interviews with their client are always video-recorded as well. In order to keep an accurate record of the interview, the accused as well as the interpreter should be visible on the video recording and it is the solicitor's duty to insist on such a video recording being made.[258] Police and Criminal Evidence Act (PACE) 1984 Code F is also relevant in this respect, where it provides that a video-recorded interview should be made when "the suspect or other person whose presence is necessary is deaf or deaf/blind or speech impaired and uses sign language to communicate".[259]

[254] Before 1 October 2012 there was already a system in place for the compensation of legal costs for successful defendants and appellants. This system still applies to cases commenced prior to 1 October 2012.
[255] In this paragraph reference is made to the version of this Practice Note as issued on 2 December 2019.
[256] S. 60 of PACE 1984 provides that the Secretary of State has to issue a code of practice on the audio recording of police interviews with suspects. Code of Practice E regulates audio recording of interviews with suspects and provides in par. 3 when interviews are to be audio recorded. In general interviews with persons cautioned under Code of Practice C in respect of any indictable offence (including either way offences), unless it is clear that no prosecution will follow or if there are practical reasons (such as equipment failure) and the interview should not be delayed.
[257] In this paragraph reference is made to the version of this Practice Note as issued on 10 December 2019.
[258] Practice Note, paragraph 2.1.
[259] Pace Code of Practice F 2018, S. 2.2 (c).

2.5.8 Use of Interpreters in Criminal Cases

This Practice Note "Use of interpreters in criminal cases"[260] advises criminal defence solicitors on the instruction of interpreters pre-trial at the police station as well as in court. The use of interpreters in criminal proceedings is important:

> "Accurate interpretation plays a vital role in the criminal process, and can potentially make all the difference between a defendant being found guilty or not guilty. A good interpreter will have:
> - linguistic competence
> - a professional attitude
> - an understanding of the legal process and his duties
> - an understanding of the need for impartiality and confidentiality
> - the ability to interpret exactly, and only, what is asked and what is answered."[261]

After the solicitor has checked whether his client needs the assistance of an interpreter, he can select an interpreter from either the National Register of Public Service Interpreters (NRPSI) or the Signature Directory (for sign language interpreters).[262]

The police are obligated to make appropriate arrangements for the provision of a qualified and independent (sign language) interpreter at the police station,[263] but it is the solicitor's responsibility to ensure that his client's interpretation needs are met. The solicitor should also decide whether the interpreter who is arranged by the police for police interrogation, can also assist when taking instructions and advising the client.[264] According to the Practice Note, that interpreter will in principle be appropriate, but the Practice Note also provides some examples of circumstances in which it would be advisable to use a different interpreter:

- "[…] the interpreter cannot meet all the client's needs […];
- there are multiple suspects;
- the client knows the interpreter arranged by the police personally;
- the charges are of a particularly sensitive and/or serious nature;

[260] In this paragraph reference is made to the version of this Practice Note as issued on 10 December 2019.
[261] Practice Note, paragraph 2.
[262] Practice Note, paragraph 2.2.
[263] PACE Code of Practice C 2018, S. 13.
[264] Practice Note, paragraph 3.1.

- there is a significant risk that the client's comprehension of police questioning, and/or the accuracy of the interpretation of police questioning will be disputed, and the interpreter is a potential prosecution witness in the matter;
- community relations are such that the client has little confidence in the interpreter/police relationship, and this may affect the quality of your consultation and the development of the confidential relationship between you and your client."[265]

If the solicitor believes it is safe to be assisted by the interpreter arranged by the police, he should first explain the situation to the client and obtain his consent. Moreover, he should be very careful in confirming with the interpreter that they are bound by their Code of Conduct and that they are therefore obliged to maintain confidentiality of the solicitor's communication with his client. It is advised to make a note of this in the file.[266] The interpreter's fee is paid either by the client himself (if he pays for his own solicitor) or under the legal aid scheme (for legal aid clients) but only if the solicitor has obtained prior authority from the Legal Services Commission (LSC) for instructing the interpreter.[267]

The arrangement of interpreters in court lies with different parties to the proceedings, depending on the person who needs interpretation. Interpreters for defence witnesses have to be arranged by the defence, the prosecution arranges interpreters for prosecution witnesses and the court generally arranges interpreters for defendants. The Practice Note advises solicitors to instruct a different interpreter in court than the interpreter at the police station.[268]

2.5.9 Withdrawing from a Criminal Case

Under certain circumstances and only when there are compelling reasons, professional obligations of the criminal defence solicitor will force him to withdraw from a case (for example, if there is a conflict of interests between co-accused[269]). However, if withdrawal takes place close to or during the trial, professional obligations are not only owed to the

[265] Practice Note, paragraph 3.1.1.
[266] Practice Note, paragraphs 3.1.2 and 6.
[267] According to the Equality Act 2010, s. 20, sign language interpreter's fees cannot be passed on to the client (this is only relevant if it concerns a private client). The Practice Note advises solicitors to check whether the client has support in place (for example Access to work provision), which can cover the costs of the interpreter.
[268] Practice Note, paragraph 5.3.1: just in case a dispute arises over the interpretation of the record of the police interview.
[269] See para. 3.1.3 of this Chapter for more information on dealing with (potential) client conflicts.

accused, but also to the court. This Practice Note provides guidance on the ethical challenge caused by this conflict of professional obligations.

The Practice Note "Withdrawing from a criminal case"[270] clearly states that it is for the solicitor and not the court to decide whether there are compelling reasons to withdraw from a criminal case.[271] It is understandable that the court might make observations on the matter and request further explanation as to the reasons why the solicitor decided to withdraw. However, the court will have to respect the professional judgment of the solicitor. This also means that the solicitor cannot be forced to share any confidential information, so that it is not always possible to provide a satisfactory explanation for the withdrawal.[272]

Another issue arises when the client wishes to change solicitors. In principle, the client can end his retention of a specific solicitor at any time, and for any reason. However, when this happens in a criminal case, how the solicitor may react depends on client funding. When a client is privately funded and wants to end his retention of a specific solicitor, the solicitor has to withdraw from the case. No further explanation is required.[273] The situation is different when the client is publicly funded. If a publicly-funded client applies for a change of representation, the court can either grant or refuse such application. In order for the court to make a reasoned decision, the solicitor will have to provide details of either:

- the nature of the duty under the SRA Code of Conduct that he considers obliges him to withdraw from the case;
- the particular circumstances that render him unable to represent the individual.[274]

Again, the solicitor's legal professional privilege might prevent him from sharing certain information. This may mean that the court cannot be fully informed, but the court will have to respect the fact that the solicitor cannot reveal all relevant information without the proper consent of his client.

The Practice Note also provides guidance with regard to the situation where the solicitor accepts instructions from a new client, more specifically a 'transferred case'. In light of the overriding objective (as introduced by the CrimPR), the solicitor should ensure that he makes full enquiries of the court and ask to be given all the relevant information it can provide in order for the solicitor to make a profound decision on whether he is able on a practical level to take over the case and comply with all the court's requirements. This is important because, in light of the solicitor's duties to the court (the overriding objective) in assisting the court in effectively managing all cases, he is no longer allowed to withdraw from the case once he

[270] In this paragraph reference is made to the version of this Practice Note as issued on 9 December 2019.
[271] Practice Note, paragraph 2.1.
[272] Practice Note, paragraph 4.
[273] Practice Note, paragraph 3.1.
[274] Practice Note, paragraph 3.2.

takes over the case. As an officer of the court, the solicitor is obliged to comply with the orders of the court and if applying to these orders means that it becomes impossible for the solicitor to maintain his normal standard of competence in looking after the client's interests, he is not in breach of the SRA Code of Conduct according to the Practice Note.[275]

2.5.10 Use of Social Media

The Law Society issued a Practice Note "Use of social media"[276] of which only the part concerning commenting in public online spaces is discussed here.[277] When posting opinions or participating in (online) debates, the solicitor should be constantly aware of his professional duties, particularly his duties of confidentiality and professional integrity. The solicitor should always be aware of the effect his comments could have on his person and on his practice. Moreover, since sharing experiences about previous cases might cause the solicitor to intentionally or unintentionally breach client confidentiality, sharing experiences should therefore be done with great care. Even simply checking in at a specific location on a social media platform might inadvertently disclose confidential information about meeting a client.[278] Lastly, the Law Society stresses from the moment information is published on social media, the information is very difficult to control. Solicitors should be aware of the fact that information on social media can be abused very easily by third parties.[279]

2.6 England and Wales: Professional Ethics Guidance by the Bar Council and the BSB

The BSB has issued several documents, specifically applying to barristers practising criminal advocacy.[280] This guidance[281] concerns the following topics: pre-instruction conflicts (when

[275] Practice Note, paragraph 5.3.
[276] In this paragraph reference is made to the version of this Practice Note as issued on 5 December 2019.
[277] The Practice Note covers all the professional and personal benefits of social media, as well as its pitfalls.
[278] Practice Note, paragraph 3.1.2.
[279] Law Society's Practice Note on Social Media, 18 June 2015, § 5.2.3: "The speed at which information can be circulated, and the proliferation of that information, is something over which your practice will have little control. Similarly, even though you may attempt to remove any posted content, it is possible for others to take and retain screenshots of that content, and thereafter make it available."
[280] Provisions and guidance in the general BSB Handbook applying to criminal defence are discussed in paragraph 3.
[281] The Bar Council launched an online platform specifically designed to offer practical guidance to barristers: https://www.barcouncilethics.co.uk/ All documents referred to in the following, can be found on this online platform. It should be noted, however, that the documents referred to in paragraph 2.6 are not to be considered as "guidance" for the purposes of the BSB Handbook, nor are these documents legal advice. This means that the views and advice provided in these documents is not binding.

a barrister receives instructions from both the defence and prosecution in the same case), being appointed by the court to represent an accused, making comments in the media, drafting defence statements, contacting witnesses and being instructed as 'independent counsel' to supervise searches of law firms by the investigative authorities.

2.6.1 Pre-Instruction Conflicts and the Cab Rank Rule

Barristers in England and Wales can represent both accused and prosecution, although not in the same case. This practice might cause professional embarrassment for a barrister if he receives instructions from both the defence and the prosecution in the same case. Particularly, if he has already discussed the case with party A, it is important for the barrister to determine whether the knowledge already in his possession would cause undue advantage when accepting instructions from party B. If this is the case, he has to accept instructions from party A on the basis of the principle of confidentiality. If this is not the case, he has to accept the instructions of the party who first approached him with official instructions on the basis of the "cab rank rule".[282] Since this cab rank rule is a unique aspect of rules of conduct for English barristers, it will be briefly clarified here.

The cab rank rule has been in existence for centuries and allegedly originates from the famous words of Thomas Erskine, a renowned lawyer in the 18th century, justifying his unpopular defence of Thomas Paine:[283]

> "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end."[284]

The 'cab rank' is used as a metaphor for the Bar. Just like a cab for hire cannot refuse to carry a passenger, a barrister must accept instructions irrespective of his opinion regarding the case or the client.[285] This metaphor is, however, not entirely correct. While passengers by custom are obliged to take the first available cab in the rank, clients can choose which barrister they wish to instruct. As such, the cab rank rule ensures that clients[286] can choose from the whole range of barristers available. This illustrates the rationale behind the rule,

[282] The Ethics Committee of the Bar Council, "Conflicts – pre-instruction discussions", August 2019.
[283] Thomas Paine was prosecuted in 1792 for seditious libel, because he had written a book entitled the Rights of Man, in which he advocated the right of people to replace their Government if they thought it inappropriate.
[284] Cited by Lord Pearce in *Rondel v Worsley* [1969] 1 AC 191 (HL) (paragraph 275A-D).
[285] McLaren, Ulyatt & Knowles 2013, paragraph 6.
[286] The BSB Guidance to the cab rank rule, September 2015 (available on the BSB website) implies that the cab rank rule only applies when instructed by professional clients.

namely that it fosters access to justice and the rule of law by guaranteeing individuals seeking justice to be able to instruct the best qualified barrister available, even if it concerns an "odious client or unpopular cause".[287]

At the same time the cab rank rule not only serves those seeking justice, it also protects barristers from unfavourable public opinion: the cab rank rule clearly defines the professional distance between the barrister and the case and client.[288] Thus the cab rank rule works both ways. It not only guarantees each accused of legal representation by a barrister if desired. It also provides barristers certain immunity from public opinion and it protects barristers from claims of a certain party to act only for their cause. This is particularly important for English barristers, especially self-employed barristers, because they may alternately act for defence and prosecution as referred to above.[289]

Notwithstanding its laudable purpose and longstanding tradition in upholding one of the core values of the English Bar, namely neutrality to underline the Bar's professional independence,[290] the cab rank rule has been the subject of much debate, particularly in the past decade.[291] This debate has centred around the question whether the cab rank rule is still to be maintained in the current legal services market, which has become much more differentiated and complex as illustrated in paragraph 2.4 of this Chapter. The fact that barristers are no longer the only members of the legal profession qualified to represent accused persons in court makes retaining the cab rank rule questionable.

2.6.2 Court-Appointed Legal Representatives

Although it is not common practice to appoint legal representatives to an accused,[292] it can be deemed necessary in particular circumstances, for example when it concerns allegations of rape and the accused has to cross-examine the victim.[293] When appointed, the barrister has to be aware of the precarious position he is in, since he has to balance the interests of justice and the interests of an accused who is quite likely to be considered a "difficult" individual by the authorities. Usually a barrister is specifically appointed for the sole purpose

[287] McLaren, Ulyatt & Knowles 2013, paragraph 16.
[288] Lord Reid in *Rondel v Worsley* [1969] 1 AC 191 (HL) at 227D-F; McLaren, Ulyatt & Knowles 2013, §§ 16 and 18; *Giannarelli v Wraith* (1988) 165 CLR 543 (High Court of Australia), cited in McLaren, Ulyatt & Knowles 2013, p. 85. Australian rules of conduct for the Bar also know the cab rank rule (rules 21 and 22), cited at pp. 74-75.
[289] See para. 2.4.3 of this Chapter.
[290] Boon 2014, pp. 84 and 121.
[291] See: McLaren, Ulyatt & Knowles 2013; Kentridge 2013; Flood & Hviid 2013.
[292] The Ethics Committee of the Bar Council, "Court Appointed Legal Representatives", June 2018, paragraph 2.
[293] Cross-examination by defendants is regulated by the Youth Justice and Criminal Evidence Act 1999, ss. 34-37.

of conducting cross-examination so that the witness does not have to be confronted with the accused. The barrister in that regard will not be responsible to the accused, nor will he be considered a representative of the court.[294] This means that the barrister will not take instructions directly from the accused,[295] unless the accused instructs the barrister at the end of the cross-examination to act on his behalf.[296]

Cross-examination is often a decisive element of proceedings. If the barrister is not clear on the exact purpose and parameters of the questions that he can put to the witness in cross-examination he runs the risk of asking the wrong questions, which might generate answers that are detrimental to the defendant's case. This means that when appointed, the barrister has to be informed by the court what exactly is expected of him and the court has to ensure that the appointed barrister receives all the relevant case material (for example, evidence and unused material).[297]

2.6.3 Commenting to the Media

Traditionally, barristers were not allowed to comment on current or future proceedings to the media.[298] The current BSB Code of Conduct, however, does not contain any provision prohibiting barristers to comment to the media. In addition to guidance on commenting to the media in the BSB Handbook and BSB Guidance, the Ethics Committee of the Bar Council focuses on expressing personal opinions in the media. The Bar Council stresses that barristers are under no professional obligation to express personal opinions in the media[299] and should also be aware of the risks when doing so. If the client wants the barrister to comment to the media, the barrister should emphasise to his client that he is trained to

[294] Youth Justice and Criminal Evidence Act 1999, s. 38(5) and The Ethics Committee of the Bar Council, "Court Appointed Legal Representatives", June 2018, paragraphs 10 and 35.
[295] The Ethics Committee of the Bar Council, "Court Appointed Legal Representatives", June 2018, paragraph 37.
[296] The Ethics Committee of the Bar Council, "Court Appointed Legal Representatives", June 2018, paragraph 33.
[297] The Ethics Committee of the Bar Council, "Court Appointed Legal Representatives", June 2018, paragraph 36.
[298] 8th Edition of the Code of Conduct: "709.1 A barrister must not in relation to any anticipated or current proceedings or mediation in which he is briefed or expects to appear or has appeared as an advocate express a personal opinion to the press
or other media or in any other public statement upon the facts or issues arising in the proceedings.
709.2 Paragraph 709.1 shall not prevent the expression of such an opinion on an issue in an educational or academic context."
[299] The Ethics Committee of the Bar Council, "Expressing personal opinions to/in the media", December 2018, paragraph 10.

speak in open court, not to make statements to the media.[300] When considering expressing personal opinions in the media, the barrister must be aware of his duties to the client (confidentiality and professional privilege) and to the profession as a whole (upholding trust and confidence in the profession).[301] The Ethics Committee of the Bar Council stresses the importance of keeping personal opinions expressed in the media under control. For instance, control is more easily maintained over opinions expressed in written media.[302] The Committee also refers to social media (such as Twitter and Facebook) in its guidance and warns barristers to be very cautious, since it concerns a form of media which is very difficult to fully control and information published through social media can easily be abused by third parties.[303] Lastly, the Ethics Committee of the Bar Council advises that trial by media should be prevented, so that expressing personal opinions in the media can never be used as a litigation tactic.[304] Specifically in criminal cases, these personal opinions could distract a judge and even more so a jury to the extent that judicial decisions are no longer primarily based on (legal) arguments but on personal opinions expressed by barristers.[305]

In sum, the barrister needs to individually assess the particular circumstances of each case and the client's interests. The barrister will have to ensure that his client's interests benefit from the media comment, he will also have to guarantee that making the comments does not diminish the public's trust and confidence in the legal profession as a whole and he has to take notice of his duty of confidentiality, which means that client explicit and informed consent is needed to make any comments to the media.

2.6.4 Defence Statements

It has already been mentioned that solicitors are primarily occupied with obtaining information, and particularly unused material, from the police and the prosecution in preparation of the defence and in particular the defence statement.[306] Barristers are

[300] The Ethics Committee of the Bar Council, "Expressing personal opinions to/in the media", December 2018, paragraph 12.
[301] The Ethics Committee of the Bar Council, "Expressing personal opinions to/in the media", December 2018, paragraph 13.
[302] The Ethics Committee of the Bar Council, "Expressing personal opinions to/in the media", December 2018, paragraph 18.
[303] The Ethics Committee of the Bar Council, "Expressing personal opinions to/in the media", December 2018, paragraph 21: "In particular, expressions of opinion via these more modern forms of media are often instantaneous, may be blunt or unduly simplistic, can be readily and widely disseminated, and may be difficult, if not impossible to retract."
[304] The Ethics Committee of the Bar Council, "Expressing personal opinions to/in the media", December 2018, paragraphs 30-31.
[305] The Ethics Committee of the Bar Council, "Expressing personal opinions to/in the media", December 2018, paragraph 33.
[306] See para. 2.5.1 of this Chapter.

responsible for drafting these defence statements, which are "of fundamental importance in criminal trials".[307] The Bar Council points out to barristers who have to draft defence statements that they have a serious responsibility. Barristers have to make sure that they base the defence statement on accurate instructions[308] and ensure that the statement is served timely and completely since the accused is liable to be cross-examined about the contents of the statement.[309]

2.6.5 Witness Preparation

Traditionally, barristers are only allowed to have limited contact with witnesses pre-trial. They are, for example, prohibited to draft witness statements unless it concerns evidence which the witness would have provided orally. Moreover, barristers are explicitly prohibited to "[…] rehearse, practise with or coach a witness in respect of their evidence".[310] Barristers are thus allowed to familiarise witnesses with the rules of criminal procedure and prepare them for the experience of giving evidence at trial.[311]

The Court of Appeal in the case of *Momodou*[312] made a clear distinction between witness coaching and witness familiarisation. According to the Court of Appeal witness familiarisation is highly recommended, because it will only contribute to the usefulness of the evidence and the effectiveness of the trial, since witnesses know what to expect and will likely be less overwhelmed in court. Witness coaching on the other hand is strictly prohibited. It should be noted that the prohibition of witness coaching does not prevent the barrister from discussing the substance of their evidence with witnesses; it merely delimits this discussion and the barrister should be aware of the practical repercussions. Any suspicion of witness coaching might diminish the evidential value of a statement in the eyes of the court and it might cause the barrister to become a witness himself in his client's case. Suspicion of witness coaching might arise in the event that the barrister contacts the witness in the absence of his professional client or representative or if the discussions take place with more than one witness or if the barrister discusses evidence of one witness with another witness.[313] The defence has to inform the court and the prosecutor, by way of the defence witness notice

[307] The Ethics Committee of the Bar Council, "Defence Statements", April 2019, paragraph 1.
[308] The Ethics Committee of the Bar Council, "Defence Statements", April 2019, paragraph 4.
[309] The Ethics Committee of the Bar Council, "Defence Statements", April 2019, paragraph 1; see also: Owusu-Bempah 2013, pp. 187 and 194-195; Attorney General's Office, *Attorney General's Guidelines on Disclosure – For investigators, prosecutors and defence lawyers,* December 2013, paragraph 32; *R v Haynes* [2011] EWCA Crim 3281.
[310] The Ethics Committee of the Bar Council, "Witness Preparation", November 2019, p. 2; BSB Handbook Version 4.3 (2019), rC9.
[311] The Ethics Committee of the Bar Council, "Witness Preparation", November 2019, paragraph 6.
[312] Court of Appeal in *R v Momodou* [2005] EWCA Crim 177, [2005] 2 Cr App R 6.
[313] Court of Appeal in *R v Momodou* [2005] EWCA Crim 177, [2005] 2 Cr App R 6, paragraphs 61-65.

already mentioned, beforehand if he wishes to call any persons as witnesses at the trial. A similar duty of notify exists when calling expert witnesses.[314]

2.6.6 Barristers instructed as "Independent Counsel"

When a law firm is being searched, the investigating authority routinely instructs a barrister as "independent counsel" to advise on the seizure of privileged material.[315] The term "independent" refers to the fact that the barrister who is instructed plays no role in the actual search and seizure and should not be considered an employee of the investigating authority.[316] The barrister is instructed to inspect the material of which the investigating officer suspects that it might be privileged or material which is claimed to be privileged. As such, instructing an "independent counsel" is an important prerequisite for safeguarding legal professional privilege.

According to the guidance issued by the Bar Council's Ethics Committee, the barrister who has been instructed as "independent counsel" should only advise on the matter of privilege and not on any other matters relating to the search, such as whether the search is being carried out according to the conditions of the warrant.[317] Furthermore, he should ensure that the scope of his role is clear. In particular, he has to ensure that the instructions are clear on how to handle communications made by a person claiming privilege to the barrister when acting as independent counsel. These communications are not automatically considered to be confidential and might have to be communicated to those instructing the barrister.[318]

2.7 England and Wales: Code of Conduct for Public Defenders

Another set of specific regulations for criminal defence lawyers providing legal assistance to suspects and accused persons in English criminal proceedings concerns the Code of Conduct for Public Defenders. The PDS was launched in 2001 following the Government's proposal to

[314] CJA 2003, ss. 34-35.
[315] The Ethics Committee of the Bar Council, "Barristers instructed as "Independent Counsel" to advise upon legal professional privilege in relation to seized material", June 2018, paragraph 3.
[316] The Ethics Committee of the Bar Council, "Barristers instructed as "Independent Counsel" to advise upon legal professional privilege in relation to seized material", June 2018, paragraph 6, which includes reference to relevant case law.
[317] The Ethics Committee of the Bar Council, "Barristers instructed as "Independent Counsel" to advise upon legal professional privilege in relation to seized material", June 2018, paragraphs 7-8.
[318] The Ethics Committee of the Bar Council, "Barristers instructed as "Independent Counsel" to advise upon legal professional privilege in relation to seized material", June 2018, paragraph 17.

institute a system of defenders who are directly salaried by the former LSC.[319] In 2014, the PDS expanded its services by adding an advocacy unit to its services, which means that the PDS can now supply criminal defence lawyers for any phase in criminal proceedings.

The PDS was launched to make defence services more cost-efficient than the services provided by private lawyers and as such the PDS should provide a test or benchmark for the cost and quality of the criminal defence service in general.[320] Research[321] has shown that PDS employees are more likely to attend a police station interrogation for own clients as well as duty calls; they generally spend less time on police station investigation cases; PDS clients tend to exercise their right to silence more often than clients of private practice and in the investigative stage PDS employees get better results for their clients and in the trial stage a higher rate of cases is dropped.

Regarding professional independence, this research[322] furthermore shows that, because PDS employees are funded and receive a steady income, the majority feel they can work more independently since they are not tempted to balance their own financial interests and the interests of the client (as opposed to privately funded lawyers). They also indicate that they are equally or even more willing to stand up for their clients and to challenge the police and the prosecution, although they also seem to be more keen on advising early pleas of guilty. According to most PDS employees, early pleas of guilty are less lucrative for lawyers, though more advantageous for accused (the earlier the plea, the greater the reduction of sentence). According to PDS employees, this shows that they are professionally independent and act only in the best interest of the client.

The PDS issued its own Code of Conduct.[323] This Code, which applies to all PDS employees, exists alongside the other codes of professional conduct applying to PDS employees (depending whether the individual is a solicitor, barrister or legal executive), but the Code does not explicitly regulate which code takes precedence in case of conflicting regulations between the different codes.[324] Additionally, the PDS designed a protocol for PDS

[319] Modernising Justice 1998, § 6.18.
[320] Bridges et al. 2007, pp. 1-4.
[321] Bridges et al. 2007, pp. 117-118.
[322] Bridges et al. 2007, p. 278 et seq. A question, which is not answered by Bridges et al. is whether this advice on pleading guilty is always the correct advice. Although this is a difficult – if not impossible – question to answer in general terms, it is a fundamental question regarding the lawyer's professionalism and integrity. Indeed, early pleas of guilty could also be an indication of lack of quality.
[323] The PDS Code of Conduct 2014 can be downloaded from the PDS website: http://publicdefenderservice.org.uk/advocates/about-us/
[324] PDS Code of Conduct 2014, paragraph 1.3: "This Code applies in addition to any professional or staff code that binds a civil servant. Where any doubt arises as to the interpretation of this Code, the issue shall be referred to the professional head of service who shall provide advice and guidance on the matter, consulting wherever appropriate with those responsible for other professional codes. So far as it is possible to do so, this Code must be interpreted in a way which is compatible with the codes of other professional bodies."

advocates for the receipt of third-party instructions.[325] This protocol provides practical guidance for advocates who have received instructions to act for co-accused where a conflict of interests exists and separate litigators have already been instructed. The protocol prescribes that the advocates have to be assigned to different PDS offices and within each office two individuals (referred to as a 'relevant individual') will be responsible for handling all information relating to this case. Moreover, all communication is kept outside the regular PDS case management system and is directly forwarded to the responsible advocate by the relevant individuals. Case papers will also be retained separately in locked cabinets, which are only accessible for the relevant individuals and advocate. Furthermore, the advocate will use a secure IT system for case work and will have a secure room available to work in, so that he will not have to use the open plan areas of the office. All these measures are taken to ensure that any risk of breach of confidentiality or lawyer-client privilege is minimised if two or more PDS advocates are instructed to act for co-accused, and to avoid any conflicts of interests.

The PDS Code of Conduct mainly describes the professional duties of PDS lawyers.[326] The primary duty of the PDS lawyer is to protect the interests of the client.[327] This means that the lawyer may use all "proper and lawful means" to ensure that the client receives a fair hearing, but at the same time the lawyer may only protect the client's interests "so far as consistent with any duties owed to the court and any other rules of professional conduct".[328] The PDS lawyer's duty to the court entails that he is not allowed to "recklessly or knowingly mislead the court or tribunal" and that he will always have to conduct himself in a way that is "consistent with the proper and efficient administration of justice".[329] Protecting the interests of the client also means that the lawyer cannot put any pressure on the client to plead guilty and is only allowed to advise to plead guilty if he is satisfied that the prosecution is able to actually prove the client's guilt.[330] When performing his duties, the PDS lawyer has to act with integrity and maintain his professional independence.[331] With respect to the acceptance of a case, the PDS Code of Conduct prescribes that the lawyer treat all clients "fairly, reasonably and without discrimination",[332] which means that he is not allowed to

[325] PDS, *Protocol for receipt of third party instructions by PDS advocates*, which can be downloaded from the PDS website:
http://publicdefenderservice.org.uk/advocates/about-us/

[326] The fact that the lawyers are remunerated exclusively by the PDS is reflected in the PDS Code of Conduct, paragraph 8. It states that PDS lawyers are not allowed to offer or accept any payment, unless it is provided for in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[327] PDS Code of Conduct 2014, paragraph 2.

[328] PDS Code of Conduct 2014, paragraph 2.1.

[329] PDS Code of Conduct 2014, paragraph 6.2.

[330] PDS Code of Conduct 2014, paragraph 2.2.

[331] PDS Code of Conduct 2014, paragraphs 3 and 13.

[332] PDS Code of Conduct 2014, paragraph 4.1.

refuse a case because of "the nature of the allegation, the nature of the client or because of the PDS lawyer's personal views".[333] Moreover, the lawyer has to ensure that he is competent and authorised to conduct the case effectively.[334] PDS lawyers also have a duty of confidentiality, which means that they will keep "all information about a client confidential within the PDS".[335] However, some exceptions apply to this duty of confidentiality, such as the duty to disclose certain financial information[336] and exceptions as determined by court order.[337] This duty of confidentiality also plays an important role in the regulations concerning the duty to avoid conflicts of interests.[338] According to the PDS Code of Conduct, PDS solicitors are not allowed to act for more than one client in a case when a potential or actual conflict of interests exists,[339] while PDS advocates are allowed to act for more than one client in the same case provided that they explain the risks of the joint representation and obtain written consent from all clients involved.[340] When a conflict arises, the PDS lawyer has to cease acting for all clients,[341] unless continuing to act for one client will not lead to a breach of confidentiality.[342]

Lastly, the PDS Code of Conduct mentions circumstances in which the PDS lawyer is *obliged* to stop acting for a client, namely when there is a significant risk of or actual conflict of interests[343] or significant risk of or actual breach of confidentiality; when there is a significant risk of or actual conflict between the client's interests and the lawyer's duty to the court; when the client withdraws instructions or when continuing to act would cause the lawyer to become professionally embarrassed.[344] In other circumstances, the PDS lawyer is *allowed* to stop acting, namely when the client is "violent, threatening or abusive" or when the head of the PDS office approves of the lawyer ceasing to act for this client.[345]

---

[333] PDS Code of Conduct 2014, paragraph 4.4.
[334] PDS Code of Conduct 2014, paragraphs 4.2-4.3.
[335] PDS Code of Conduct 2014, paragraph 5.1.
[336] Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss. 33-35.
[337] PDS Code of Conduct 2014, paragraph 5.2.
[338] PDS Code of Conduct 2014, paragraph 7.
[339] PDS Code of Conduct 2014, paragraph 7.1. The regulations concerning conflicts of interests in the SRA Code of Conduct 2018 are more nuanced, since they allow solicitors to act for clients whose interests (possibly) conflict under strict circumstances (SRA Code of Conduct 2018, paragraph 6).
[340] PDS Code of Conduct 2014, paragraph 7.3. This regulation corresponds with the BSB Handbook Version 4.3 (2019), rC21 (3). In this regard the already mentioned PDS Protocol for receipt of third party instructions by PDS advocates is also important, since it explicitly deals with the representation of co-accused where a conflict of interests exists.
[341] PDS Code of Conduct 2014, paragraph 7.4.
[342] PDS Code of Conduct 2014, paragraph 7.5.
[343] Subject to the regulations discussed above regarding the representation of more than one client in the same case.
[344] PDS Code of Conduct 2014, paragraph 11.1.
[345] PDS Code of Conduct 2014, paragraph 11.2.

2.8 Scotland: The Code of Conduct for Criminal Work

The Scottish Law Society has issued the Code of Conduct for Criminal Work.[346] This Code of Conduct is a statement of good practice for solicitors conducting criminal work and is to be read in conjunction with the general code of conduct for solicitors. The Code of Conduct for criminal work contains 14 Articles, dealing with upholding societal trust in solicitors conducting criminal work as well as addressing practical issues such as accepting a criminal case, contacting witnesses in preparation of the defence and sharing information with the client.

Several articles of the Code of Conduct specifically reflect the Law Society's desire to avoid abuse of professional privileges and to ensure high quality of legal services. Solicitors visiting clients who are in custody always have to be able to show some form of valid identification, such as an identification card issued by the Law Society, upon the authority's request[347] and are not allowed to give anything else but a business card and legal documents to their clients in custody.[348] Any abuse of professional privileges should be avoided, so that solicitors conducting criminal work are advised not to consult with clients in any other place than their office, the court, a hospital or the crime scene, unless it is impossible for the client to come to the solicitor's office, for example due to severe illness.[349] Additionally, solicitors are strongly advised to only in exceptional circumstances provide "private motor vehicle transport" upon their client's request. Such exceptional circumstances include the age and vulnerability of the accused, the distance that has to be covered, availability of other means of transportation. Under no circumstances, are solicitors or their employees or trainees allowed to offer clients to arrange private transport.[350] Moreover, solicitors are not allowed to make any payments to an accused or any third party related to the accused, except payments of expenses incurred by this person if he is cited to appear in court.[351] Furthermore, the Code of Conduct prescribes certain time periods during which papers relating to the case have to be retained by the solicitor. For example, papers relating to murder cases and other cases involving life imprisonment have to be retained indefinitely, while papers of less serious offences can be destroyed after three years. Destruction of the papers has to be handled in a secure way so to retain confidentiality of the papers.[352]

[346] The full text of the Code of Conduct for Criminal Work can be found on the website of the Scottish Law Society (https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-f/division-a/guidance/the-code-of-conduct-for-criminal-work/) and can be requested from the author.
[347] Code of Conduct for Criminal Work, Art. 4.
[348] Code of Conduct for Criminal Work. Art. 6.
[349] Code of Conduct for Criminal Work, Art. 8.
[350] Code of Conduct for Criminal Work, Art. 14.
[351] Code of Conduct for Criminal Work, Art. 9.
[352] Code of Conduct for Criminal Work, Art. 12.

With regard to handling case documents, the Code of Conduct for Criminal Work also prescribes that solicitors are not allowed to "give a client, or any other third party, even on a temporary basis, copies of any documents, materials or recordings".[353] Particularly in legal aid cases, the accused has no right to claim possession of the case papers. Under exceptional circumstances, for instance if it concerns a complex case, it may be necessary to provide the accused with copies of case material in order to properly prepare the defence. However, copies of sensitive case material, such as witness statements from victims of sexual offences, should never be disclosed to clients or third parties.[354] In such cases the accused is therefore always dependent on legal assistance to prepare his defence. The solicitor is obliged to do his utmost to collect all relevant information and evidence in support of the case for the defence.[355] This includes interviewing witnesses for the defence, in order to determine whether these witnesses are relevant to the case of the accused and to collect potential evidence. According to the Code of Conduct for Criminal Work, only those witnesses who are relevant to the defendant's case can be cited to appear in court[356] and the solicitor is the one who decides whether a witness will be cited. As professionals, they are best able to decide whether the evidence provided by the witness is relevant in the case of the accused.[357] Lastly, the solicitor is obliged under Scottish law to properly prepare witnesses for their appearance in court, which is called 'precognition of witnesses'.[358] Precognition involves a face-to-face interview with the witness prior to the trial to evaluate the evidence that the witness will give under oath at trial. Although it is not unusual for solicitors to hire precognition agents, the solicitor always has final responsibility for the manner in which the witness is actually prepared to trial under precognition and for ensuring that this is done in a manner which is most sympathetic to the witness's needs.[359]

Last but not least, the Code of Conduct for Criminal Work provides some regulations regarding the acceptance of a case. First of all, the solicitor is only allowed to accept instructions which are properly given by the client himself. This means that the solicitor should not accept instructions which are the result of inducement or are subject to conditions.[360] As such, the accused's right to freely choose a lawyer is respected.[361] Instructions from third parties, such as family of an accused in custody, can be accepted, but only after the solicitor has properly checked whether the accused himself has not already

[353] Code of Conduct for Criminal Work, Art. 11.
[354] Code of Conduct for Criminal Work, Guidance to Art. 11.
[355] Code of Conduct for Criminal Work, Art. 3.
[356] Code of Conduct for Criminal Work, Art. 10.
[357] Code of Conduct for Criminal Work, Guidance to Art. 10.
[358] Code of Conduct for Criminal Work, Art. 13.
[359] Code of Conduct for Criminal Work, Guidance to Art. 13.
[360] Code of Conduct for Criminal Work, Art. 1.
[361] See also Code of Conduct for Criminal Work, Guidance to Art. 2: "…the choice of a solicitor always lies with the accused person…".

instructed a solicitor himself or requested to be visited by the duty solicitor.[362] Secondly, the Code of Conduct for Criminal Work provides that the solicitor "should not accept instructions from more than one accused in the same matter".[363] This means that the solicitor should not also apply for legal aid remuneration for more than one accused in the same case.[364] According to the Code of Conduct for Criminal Work, it is obvious that a conflict of interests may arise when defending more than one accused in the same case and the solicitor should avoid the situation in which he might be in breach of confidentiality towards one of these accused. Thirdly, the Code of Conduct for Criminal Work regulates that only solicitors who have been properly instructed by the accused are allowed to visit the accused who is held in custody.[365] This is related to the accused's right to choose his own solicitor: the solicitor is always under a duty to check with the authorities whether the accused has already requested legal services from another solicitor or the duty solicitor.[366]

2.9 Providing Legal Assistance to Suspects in Police Custody

In addition to the specific sets of regulations for criminal defence lawyers, which were discussed in the previous paragraphs, also specific regulations were found for lawyers who provide legal assistance to suspect in the police station, more specifically prior to and during police interrogation. These regulations were identified in Belgium, France, the Netherlands and England and Wales.

2.9.1 Belgium: the Salduz Code of Conduct

The Flemish Bar Associations issued what is known as the *Salduz* Code of Conduct (Salduz Code) on 8 December 2011, which was updated on 18 January 2017.[367] Moreover, the Flemish Bar Associations adopted a regulation regarding legal assistance during police interrogation on 19 December 2018, which was published in the Belgium *Staatsblad*.[368] This regulation specifically focuses on mandatory education for lawyers who assist suspects during police interrogation. According to this regulation, only lawyers who have successfully

[362] Code of Conduct for Criminal Work, Guidance to Art. 1.
[363] Code of Conduct for Criminal Work, Art. 2.
[364] Code of Conduct for Criminal Work, Guidance to Art. 2.
[365] Code of Conduct for Criminal Work, Art. 5.
[366] Code of Conduct for Criminal Work, Guidance to Art. 5.
[367] Salduz Code, published by the Flemish Bar Associations on 18 January 2017. The full and original text of the Salduz Code can be requested from the author.
[368] Flemish Bar Associations, *Uniform reglement verhoorbijstand Salduz in het kader van de permanentiedienst* [C-2019/10028], Belgisch Staatsblad 9 January 2019 (pp. 668-669). The full and original text of this regulation can be requested from the author.

completed a specific training on legal assistance during police interrogation are allowed to be registered in the duty scheme (*permanentiedienst*). This duty scheme is designed to provide suspects with a lawyer, when they have not chosen a lawyer themselves or when their chosen lawyer is unavailable.

The Salduz Code reflects the view of the Flemish Bar Associations on the scope of legal assistance prior to and during each police interrogation. In their view, the Salduz Code provides a solid basis for individual lawyers to pursue the effectuation of certain defence rights which were not explicitly laid down in Belgian legislation, but which can be founded on EU and European regulations. Merely being present during the interrogation does not legitimise the interrogation; the lawyer should take his task during this stage of proceedings very seriously and take full advantage of his position in order to serve his client's best interests. The position of the lawyer during interrogation is strengthened by the 'opposition procedure' (*verzetprocedure*).[369] The opposition procedure basically means that whenever a lawyer determines that a defence right has been violated by the interrogating officer, he can request to document this in the report of the interrogation. This concerns, for example, the situation in which the lawyer is not allowed to have a confidential consultation with his client[370] or that the police refuse to provide information before the interrogation.[371] If the interrogating officer refuses, the lawyer can report this refusal to the interrogating officer's superior and to the president of the Bar.

According to the Salduz Code, the lawyer has to respond immediately to requests to offer legal assistance.[372] If he is unable to answer the request, for example because there is a conflict of interests[373] or because he is unable to reach the police station within two hours after the call,[374] he will have to notify the police and the legal aid service. Prior to the interrogation, the lawyer has to be allowed to have a confidential consultation with his client. When upon arrival at the police station, the police do not inform the lawyer of the facts which will be put before the suspect during the interrogation, the only proper advice the lawyer can give to his client is to invoke his right to silence.[375] According to the Salduz Code, lawyers are not allowed to provide legal assistance to more than one suspect in the same case to avoid any conflicts of interests between the clients. The rationale behind this rule is that it is difficult for the lawyer to establish whether there is a potential conflict of interests between the suspects due to lack of access to case materials prior to the police interrogation.

[369] Salduz Code, preamble point 7.
[370] Salduz Code, Arts. 2.5-2.6.
[371] Salduz Code, Art. 2.4.
[372] Salduz Code, Art. 1.4.
[373] Salduz Code, Art. 1.6.
[374] Salduz Code, Art. 1.7.
[375] Salduz Code, Art. 2.4.

Moreover, the lawyer is not allowed to confer with any colleagues who are assisting other suspects in the same case.[376]

During the first contact with the suspect, the lawyer explains to the suspect that he has the right to have a confidential consultation with a lawyer prior to and also during the police interrogation; that he also has the right to be assisted by his lawyer during interrogation and that he can also waive these rights. The lawyer should always advise the suspect on the consequences of waiving rights and whether he recommends legal assistance. Moreover, the lawyer has a duty to at least inform the suspect of all his defence rights, but respects the suspect's wishes regarding the defence strategy.[377] The period of confidential lawyer-client consultation prior to the interrogation is not limited in time; according to the Salduz Code the lawyer must inform the interrogating officers when the consultation has ended and that the interrogation can begin.[378]

The role and professional duties of the lawyer during interrogation are primarily laid down in chapter 4 of the Salduz Code. The lawyer has to adopt an active attitude during interrogation. This means that the lawyer safeguards the suspect's right to silence and not to incriminate himself. As soon as the lawyer is of the opinion that a specific question or the manner in which the suspect is being interrogated violates any of the suspect's rights, he will immediately interrupt the interrogation and request the interrogating officer or officers to rephrase the question, request a verbatim transcript of the interrogation from that moment on or advise the suspect not to answer that particular question.[379] This active attitude, however, does not mean that the lawyer should discuss the relevance of certain questions with the interrogating officer or officers.[380] This rule implicitly respects the interrogating officer's leading role in the interrogation. During the interrogation, the lawyer can always request an interruption to have a confidential consultation with the suspect, although such requests should not be used solely to unnecessarily hinder the progress of the interrogation.[381] At the end of the interrogation, the lawyer can requests for additional investigational measures, including putting additional questions to the suspect[382] and the lawyer has to carefully check the police record of the interrogation together with the suspect.[383] The lawyer is advised never to sign the record and may want to advise the suspect to do the same.[384]

[376] Salduz Code, Art. 2.7.
[377] Salduz Code, Art. 3.1-3.8.
[378] Salduz Code, Art. 3.7.
[379] Salduz Code, Art. 4.3 and 4.4.
[380] Salduz Code, Art. 4.5.
[381] Salduz Code, Art. 4.7.
[382] Salduz Code, Art. 4.8.
[383] Salduz Code, Art. 4.10.
[384] Salduz Code, Art. 4.11.

Lastly, the Salduz Code also contains provisions about providing legal assistance when attending a reconstruction of the facts at the crime scene.[385] The lawyer should advise his client that he is not obliged to cooperate with the reconstruction; he guarantees his client's right to silence and his right not to incriminate himself; and he ensures that no unauthorised pressure is put on the client.

2.9.2 France: the Report on the First Definition of the Role of the Lawyer during Police Custody

The general assembly of the French national Bar Association issued a report on the role of the lawyer during the custody of the suspect.[386] This report is a critical reflection on the procedural regulations governing police custody (*garde à vue*) in light of EU Directive 2013/48 on access to a lawyer in criminal proceedings. At the same time the report refers to the conduct of criminal defence lawyers during the time the suspect is held in police custody. According to the French national Bar Association, the notion and importance of effective legal assistance in criminal proceedings requires an active and dynamic role of the criminal defence lawyer particularly during the period of police custody (*garde à vue*). This active role is further explained on the basis of three main themes: conditions and lawfulness of the police custody, exercising defence rights, and legal professional ethics.

Firstly, the lawyer should review the conditions and lawfulness of the police custody. This means, for example, that the lawyer will have to check whether pre-trial custody has been imposed according to the procedural regulations. Moreover, the lawyer will have to verify whether the suspect has been informed of all the relevant (defence) rights, such as the right to contact a direct family member, the right to receive medical attention, and the right to legal assistance. In order to exercise this duty, the lawyer is entitled to consult the case file at any time during the police custody. It also becomes very clear from the report that the lawyer has an important and proactive role on a practical level of supporting the suspect, such as seeing to it that the physical conditions of custody are humane.

Secondly, he should exercise the rights of the defence to their full extent in the suspect's best interests. According to French criminal procedural law, the confidential consultation between lawyers and suspects prior to the police interrogation is limited to a maximum of 30 minutes.[387] The report pays elaborate attention to the criminal defence lawyer's role during police interrogation. In principle, the lawyer is not allowed to interrupt during the

[385] Salduz Code, Chapter 5.
[386] Report 'Première definition du role de l'avocat pendant garde à vue', adopted during the general assembly of the French national Bar Association on 8-9 July 2011. The full and original text of this report can be requested from the author.
[387] Report, p. 9.

interview, according to French criminal procedural law. The Bar Association, however, points out in its report that it cannot be expected from the lawyer that he remains silent throughout the interrogation, particularly when it is necessary to interrupt the interview in order to safeguard the suspect's interests.[388] This means in practice that the lawyer will have to be allowed to advise the suspect on his right to silence if appropriate during the interrogation; he will have to be focused on the way questions are formulated and put to the suspect; he should request the interrogating officer to rephrase the question if the suspect clearly does not understand the question; and the lawyer has to check the police report of the interrogation together with the suspect.[389]

Thirdly, in providing the suspect with effective legal assistance during the period of police custody, the lawyer should always act in accordance with professional ethical standards. This means, for example, that the lawyer has a duty of confidentiality regarding the contents of the lawyer-client consultation prior to the interrogation.[390]

2.9.3 The Netherlands: the Protocol and Guidelines for Police Interrogation and Decree on the Organisation and Order of the Police Interrogation

The Decree on the organisation and order of the police interrogation is one of the regulations implementing EU Directive 2013/48 in the Dutch criminal procedural regulations.[391] It is a governmental decree (*Algemene Maatregel van Bestuur*), explaining how the police interrogation should be organised and what the role and position is of the interrogating officer and of the criminal defence lawyer assisting the suspect. According to this decree, the interrogating officer leads the interrogation and maintains order in the interrogation room. The criminal defence lawyer has to be seated next to the suspect, provided that the interrogation room allows such seating. The criminal defence lawyer is allowed to make remarks and pose questions immediately after the interrogation has begun and immediately prior to the termination of the interrogation.[392] This implies that the lawyer is not allowed to make remarks or pose questions *during* the course of the interrogation. During the interrogation, the lawyer is only allowed to make the interrogating officer aware of the fact that the suspect does not understand the question, that the officer is putting unauthorised pressure on the suspect, or that the suspect's physical or mental condition requires the

[388] Report, p. 11.
[389] Report, pp. 11-12.
[390] Report, p. 13.
[391] *Stb.* 2017, 29 (*Besluit van 26 januari 2017, houdende regels voor de inrichting van en de orde tijdens het politieverhoor waaraan de raadsman deelneemt*). The decree is a further elaboration of Article 28d of the Dutch Code of Criminal Procedure. The full and original text of the Decree can be requested from the author.
[392] Decree, Art. 5.

interrogation to be temporarily interrupted.[393] He may also take notes, but may not make any recordings of the interrogation.[394] According to the Minister of Justice and Security, it is at the discretion of the interrogating officer to allow the criminal defence lawyer to also make remarks and pose questions during the interrogation if this is appropriate given the specific circumstances of the situation, in particular the lawyer's attitude.[395] When the interrogating officer is of the opinion that the lawyer's conduct is not in accordance with the provisions of the decree, that officer may request an assistant prosecutor to remove the lawyer from the interrogation room. After the lawyer's removal, the interrogation may only proceed if the lawyer is allowed back in the interrogation room after a while, if the suspect waives his right to legal assistance, or if another lawyer is appointed to assist the suspect.[396]

Prior to the decree's entry into force, the Dutch Bar Association also issued two documents explaining the view of the Bar Association on the lawyer's role and position when providing legal assistance to suspects who are held in police custody. It concerns a protocol with principles for defence lawyers who represent their clients during police interrogation (the Protocol)[397] and a set of guidelines on police interrogation (the Guidelines).[398] These documents are a collection of several standards and examples of best practices which can be used by criminal defence lawyers to determine their conduct prior to and during police interrogation. The Guidelines primarily focus on the rights and obligations of all parties involved in the police interrogation, while the Protocol primarily provides starting points and best practices for lawyers to put these rights and obligations into practice.

The Guidelines are divided into three chapters, while the Protocol consists of eight separate articles accompanied with elaborate explanatory notes. The third and last chapter[399] of the Guidelines focuses on the role and position of the criminal defence lawyer at the police station. The Protocol further elaborates on the articles of this part of the Guidelines. With regard to the subject matter of this research, these regulations are most interesting, which is why they are discussed first.

According to the Guidelines, it is the criminal defence lawyer's duty to act as a partial defender, trusted counsellor and adviser for the suspect.[400] The suspect's interests should always be leading in the lawyer's conduct during the pre-trial phase.[401] In practice, this means that the lawyer will have to carefully balance all the interests involved in this phase of police custody, but his focus should always be the interests of the suspect. The criminal defence

[393] Decree, Art. 6.
[394] Decree, Art. 7.
[395] Explanatory memorandum to the Decree, § 1.1.
[396] Decree, Art. 8.
[397] The full and original text of the Protocol can be requested from the author.
[398] The full and original text of the Guidelines can be requested from the author.
[399] Guidelines, Arts. 11-14.
[400] Guidelines, Art. 11 § 1.
[401] Guidelines, Art. 11 § 3; Protocol, Art. 1.

lawyer is a partial defender of the suspect's interests and by explicating this in the first provision of the Protocol, this particular role and position is also clarified to other participants in the criminal process, such as the police and the prosecution.[402]

Furthermore, the lawyer will inform the suspect of his defence rights[403] and see to it that the police interrogation proceeds in a fair manner.[404] Information about the defence rights is crucial to the suspect in order to make an informed decision about his defence strategy. In particular, during police custody the suspect's decision on the defence can have far-reaching consequences for the further course of proceedings.[405] It is also important that criminal defence lawyers always check the police report of the interrogation and to see to it that the report is a correct representation of the interrogation.[406] Again, with a view to the further course of proceedings, the Protocol underlines that the lawyer together with the suspect has to carefully verify whether the police report contains all the necessary elements and if appropriate, the lawyer will suggest additions or corrections.[407]

Legal assistance to suspects in police custody is divided into assistance prior to the interrogation (*consultatiebijstand*) and assistance during the interrogation (*verhoorbijstand*). The lawyer should fulfil these duties professionally, carefully and to the best of his abilities.[408] Assistance prior to the interrogation should be provided without any unnecessary delay, which means that the lawyer has the duty to ensure that he arrives at the police station as soon as possible after he has been notified that a suspect needs his assistance.[409] The phrase 'without any unnecessary delay' leaves room for interpretation, which is important because it will not always be possible for the criminal defence lawyer to arrive at the police station within a certain time limit.[410] If the lawyer is not able to come to the police station within a reasonable time, he will have to notify the suspect and the authorities immediately, so that a substitute lawyer can be arranged.[411] In order to provide effective legal assistance, the lawyer will need to be allowed free and unlimited access to the suspect.[412] The lawyer's conduct when providing legal assistance during police interrogation is elaborately regulated

[402] Protocol, explanatory notes to Art. 1.
[403] Guidelines, Art. 11 § 2; Protocol, Arts. 2 and 3.
[404] Guidelines, Art. 11 § 4; Protocol, Art. 7
[405] Protocol, explanatory notes to Arts. 2 and 3.
[406] Guidelines, Art. 11 § 5 and Art. 14 § 13; Protocol, Art. 8.
[407] Protocol, explanatory notes to Art. 8.
[408] Protocol, Art. 4.
[409] Guidelines, Art. 12 § 1-2; Protocol, Art. 5
[410] Protocol, explanatory notes to Art. 5 provides some examples. It should be noted however that according to criminal procedural regulations the lawyer will have to arrive within two hours after having been notified (CCP, Art. 28b §4).
[411] Guidelines, Art. 12 § 4; Protocol, Art. 6. According to the explanatory notes to Art. 6 of the Protocol, the lawyer will have to arrange for a substitute lawyer himself.
[412] Guidelines, Art. 13; Protocol, Checklist police interrogation: free and unlimited lawyer-client communication is suggested as one of the topics lawyers should inform the suspect about.

in the Guidelines. First, legal assistance is offered on the suspect's request and if the suspect decides to waive his right to legal assistance during interrogation, the lawyer will have to verify whether this waiver is made voluntarily and whether the suspect understands the present and future consequences of this waiver.[413] Second, the lawyer's conduct during police interrogation should be reserved out of respect for the truth-finding character of the interrogation, yet the lawyer should be active when this is in the best interests of the suspect.[414] According to the Protocol,[415] this means *inter alia* that the lawyer has to make sure that he is seated next to the suspect,[416] intervenes if the interrogating officer uses unauthorised pressure on the suspect,[417] is allowed to advise the suspect during the interrogation, to request a time out to confer with the suspect and to ask questions and make remarks during the interrogation.[418] Most importantly, the lawyer will safeguard the suspect's right not to incriminate himself as well as his privilege to choose his own defence strategy. All in all, it is the lawyer's duty to safeguard a fair course of the proceedings from the perspective of the suspect's interests.[419]

For the sake of completeness, the regulations in the first and second chapters of the Guidelines are described briefly. The first chapter[420] explains the rights of the suspect regarding the police interrogation, such as the right to confidential consultation with his lawyer prior to the interrogation, the right to have a lawyer present during interrogation, the right to waive these rights and the preconditions for such waiver, the right to information about case materials and the accusation prior to the interrogation, and the suspect's right to be informed of his right to silence. Lastly, the Guidelines stipulate that the State is responsible for providing adequate remuneration for criminal defence lawyers who provide legal assistance to suspects in police custody on the basis of legal aid.

Regulations for a proper progress of the police interrogation are included in the second chapter.[421] Firstly, the Guidelines promote that each interrogation be completely recorded and that those records form an integral part of the case file. Secondly, a police report be drafted in which a detailed account is given of the police interrogation. The criminal defence lawyer and the suspect must be allowed to go over this report after the interrogation has ended and they may have their remarks included in this report. The suspect signs the report. Thirdly, the Guidelines stipulate that the interrogating officer has a leading role in the interrogation. The officer is not allowed to put unauthorised pressure on the suspect and he

[413] Guidelines, Art. 14 §§ 1-2.
[414] Guidelines, Art. 14 § 3.
[415] Protocol, explanatory notes to Art. 7.
[416] See also Guidelines, Art. 14 § 4.
[417] See also Guidelines, Art. 14 § 6.
[418] See also Guidelines, Art. 14 §§ 7-11.
[419] Protocol, explanatory notes to Art. 7.
[420] Guidelines, Arts. 1-6.
[421] Guidelines, Arts. 7-10.

has to inform the suspect of his right to silence and his right to be informed about the case. If necessary, an interpreter will be called to assist. Lastly, circumstances in which limitation of the suspect's right to legal assistance is authorised are mentioned.

2.9.4 England and Wales: Code of Practice C to PACE 1984

The Police and Criminal Evidence Act (PACE) was adopted on 31 October 1984 to:

> "[…] make further provision in relation to the powers and duties of the police, persons in police detention, criminal evidence, police discipline and complaints against the police; to provide for arrangements for obtaining the views of the community on policing […]"[422]

The Act is accompanied by several codes of practice,[423] providing further regulation for investigative authorities and police on how to implement the regulations of PACE 1984. The Codes in fact form the core of the PACE system.[424] A serious breach of the rules stipulated in the Codes can lead to exclusion of evidence.[425]

For the purpose of this research, Code of Practice C[426] is most relevant. It deals with the requirements for the detention, treatment and questioning of suspects not related to terrorism in police custody by police officers. While the codes of practice are primarily written for police officials, they also provide a procedural and practical framework for the criminal defence lawyer's conduct, specifically during the pre-trial investigation. As such, these regulations are comparable to the guarantees and safeguards mentioned in the Austrian Basic Principles and the Dutch Statute. A suspect detained in England and Wales

[422] Police and Criminal Evidence Act 1984, 1984 C. 60, Introduction.
[423] The Codes of Practice (A-H) cover searching persons or vehicles (without prior arrest) and the need to make a record of a stop or encounter (Code A); searching premises and seizure of property found on premises and persons (Code B); requirements for detention, treatment and questioning of suspects not related to terrorism in police custody by police offers (Code C); identification of people in connection with the investigation of offences and keeping of accurate and reliable criminal records (Code D); audio recording of interviews with suspects in the police station (Code E); visual recording with sound of interviews with suspects (Code F); powers of arrest under section 25 PACE 1984 as amended by section 110 of the Serious Organised Crime and Police Act 2005 (Code G); requirements for detention, treatment and questioning of suspects related to terrorism in police custody by police officers (Code H). The codes of practice are regularly updated. The latest versions of the codes can be found on the PACE codes page: https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice.
[424] Zander 2012, p. 6.
[425] Zander 2012, p. 7.
[426] Code of Practice C (revised) August 2019 (Code of Practice C (2019)).

may have a criminal defence lawyer present during the police interrogation at all times.[427] The representative has an active role during this interrogation, since his only job is to advance the interests of the suspect:

> "The solicitor's only role in the police station is to protect and advance the legal rights of their client. On occasions this may require the solicitor to give advice, which has the effect of the client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene in order to seek clarification, challenge an improper question to their client or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice. Paragraph 6.9[428] only applies if the solicitor's approach or conduct prevents or unreasonably obstructs proper questions being put to the suspect answering questions on a suspect's behalf or providing written replies for the suspect to quote."[429]

It should be recalled that this provision is not specifically written to instruct solicitors on how to behave when representing their clients at the police station, but rather it serves as a reminder to police officers and specifically interrogating officers what the solicitor's role is and that this might lead to situations which are not particularly helpful to the investigation. Nevertheless, solicitors can conclude from this note that they are expected to conduct themselves in a rather active manner when representing their clients at the police station. In order to fulfil this active and autonomous role, the solicitor has to be granted access to relevant documents and materials,[430] access to the suspect[431] and be able to communicate with him confidentially, whether in person, in writing or by telephone,[432] and be allowed to consult with the suspect prior to interrogation and to be present during interrogation.[433]

The solicitor's active and autonomous role means, in practice, that sometimes his legal advice might be counterproductive to the criminal investigation. Moreover, it means that the representative is expected to interrupt the interview if he is of the opinion that unauthorised pressure is being put on the suspect or if he wants to have a private consultation with the suspect. He can also ask questions, make statements and advise the suspect to not answer

[427] Code of Practice C (2019), § 6.8.
[428] Code of Practice C (2019), § 6.9: "The solicitor may only be required to leave the interview if their conduct is such that the interviewer is unable properly to put questions to the suspect."
[429] Code of Practice C (2019), Note 6D.
[430] Code of Practice C (2019), § 3.4(b).
[431] Also when it concerns co-suspects, the solicitor should be allowed access to both suspects (Code of Practice C (2019), Note 6G).
[432] Code of Practice C (2019), §§ 6.1, 6.4, and Note 6J.
[433] Code of Practice C (2019), Note 6J.

specific questions to safeguard the suspect's right to silence.[434] Only when the representative's conduct makes it impossible for the interviewer to put questions to the suspect, may the representative be required to leave the interrogation room.[435] It is emphasised that the officer has to be able to give account for the reasons why he decided to remove the legal representative from the interview.[436] Examples of inappropriate conduct are that the representative answers questions on the suspect's behalf or provides him with written replies to quote.[437] In addition to the presence of a legal representative during interviews, all interviews are video and/or tape recorded, which has a significant impact on the quality of the interrogation.[438]

2.9.5 Concluding Remarks regarding the Provision of Legal Assistance to Suspects in Police Custody

In this paragraph specific regulations governing the conduct of criminal defence lawyers who provide legal assistance to suspects in police custody, specifically prior to and during police interrogation, have been mapped out. These regulations were identified in Belgium, France, the Netherlands and England and Wales. When analysing these regulations, some recurring themes could be identified. All regulations explicate that the suspect has the right to confidentially confer with his lawyer prior to the interrogation, to be informed of his defence rights, and to be advised on his conduct during police interrogation, for example, whether he should invoke silence or cooperate with the interrogating officer. It should be noted though that in the Netherlands and France this consultation prior to the interrogation is limited to 30 minutes. On the other hand, only in the Netherlands do the regulations explicate that the lawyer should have free and unlimited access to the suspect during the period of police custody. Furthermore, all regulations promote an active and dynamic attitude of the lawyer during interrogation. The French regulations use this attitude as the central focus, regardless of the fact that the French criminal procedural regulations are much more restrictive. Although the Dutch regulations also encourage the criminal defence lawyer to adopt an active attitude during interrogation when this is in the suspect's best interests, it should be noted that these regulations use the starting point that lawyers should act in a reserved manner during the interrogation out of respect for the truth-finding character of the interrogation.

[434] Code of Practice C (2019), Note 6D.
[435] Code of Practice C (2019), §§ 6.9 and 6.10.
[436] Code of Practice C (2019), Note 6E.
[437] Code of Practice C (2019), Note 6D.
[438] Vanderhallen et al. 2014.

The Belgian as well as the Dutch regulations oblige the lawyer to respond to a call for legal assistance as soon as possible and to notify the suspect and the authorities immediately if for any reason the lawyer is unable to make it to the police station in time. Furthermore, these regulations are explicit on the fact that the suspect is the one who decides the defence strategy and in only the Belgian and Dutch regulations was a provision found referring to the lawyer's duty to carefully verify the police record together with the suspect. Only the Belgian regulations advise the lawyer not to sign the record and to advise the suspect to do the same.

The Belgian and even more so the French regulations emphasise the importance of sufficient information about case material in order to properly advise the suspect on the best defence strategy. The Belgian regulations prescribe that the lawyer should advise the suspect to invoke silence as long as no information about the case file is shared with the defence. The French regulations emphasise that the lawyer should have unlimited access to consult the case materials during the period of police custody. The regulations do not go so far as to allow the lawyer to make or request photocopies of the case material.

Only the French and Dutch regulations refer to the duty to adhere to the common professional ethical standards when providing legal assistance to suspects in police custody. And only the Dutch and English regulations describe the criminal defence lawyer's role in the police station. Both regulations emphasise the lawyer's partial position as the suspect's defender, trusted counsellor and legal adviser. This is not only a reminder for the lawyer to act professionally and diligently, it is also a reminder for the authorities of the specific and unique position of the criminal defence lawyer. This becomes clearest in the English regulations which are drafted primarily for police authorities.

Lastly, some regulations were identified which are unique to Belgium. First, there a unique *verzetsprocedure* exists, which is an official procedure open to the lawyer to explicitly oppose any irregularities encountered during police custody. Furthermore, the Belgian regulations are unique in explicitly prohibiting legal representation for more than one client in the same case at this stage of proceedings. The rationale behind this rule is that at this stage information on the case file is generally so scant that it would be virtually impossible for the lawyer to verify whether there are conflicting interests between the co-suspects.

2.10 Conclusion

Specific sets of regulations concerning the conduct of criminal defence lawyers in Austria, Germany, the Netherlands, England and Wales, and Scotland were discussed. First, it is noteworthy that each set of regulations has a different structure and approach. In Austria, Germany and Scotland the regulations are presented as a list of principles accompanied with specific guidance. Among these regulations, the German Statements are the most elaborate (76 statements), followed by the Scottish Code of Conduct (14 articles) and the Austrian Basic

Principles (13 principles). The German Statements are further divided into chapters and paragraphs. In England and Wales the regulations are laid down in different statements, practice notes and commentaries in which particular issues regarding criminal defence are discussed. A unique feature of the English regulations is that the independent and partial role of the criminal defence lawyer is explained also in practice codes for the police (Code of Practice C to PACE 1984) and the police are urged to respect this particular role. In addition to these specific documents and regulations, the English Public Defender Service (PDS) also issued its own Code of Conduct which applies to PDS solicitors and advocates in addition to the general codes of conduct. Lastly, the Dutch Bar Association for criminal defence lawyers issued a document which contains not only rules of conduct, but also privileges for criminal defence lawyers to ensure an effective criminal defence. This combination of conduct rules and privileges is unique to all sets of regulations identified.

All regulations have in common that they provide not only regulations, but also (extensive) guidance to explain how these regulations should be put into practice by criminal defence lawyers. They, furthermore, have in common that they exist alongside the general codes of conduct for lawyers and thus should be understood in the context of these general rules of conduct. In that regard all regulations state that they are considered as best practice of the application of general rules of conduct in the context of criminal defence.

In addition to the specific sets of regulations for criminal defence lawyers, specific codes, guidelines, and protocols concerning the criminal defence lawyer's role when offering assistance to suspects prior to and during police interrogation were identified in Belgium, France, the Netherlands and England and Wales. Like the specific sets of deontological regulations mentioned above, these regulations should be read in conjunction with the general codes of conduct and it should be noted that their scope is limited because they only cover a very specific part of criminal defence, namely the provision of legal assistance to suspects in police custody.

In this concluding paragraph, the regulations identified are categorised using the four roles of criminal defence lawyers: legal representative, strategic adviser, trusted counsellor and spokesperson. This integrated overview allows for a structured synthesis in Chapter 4.

2.10.1 The Criminal Defence Lawyer as Legal Representative

When accepting a criminal case, the Dutch Statute reminds criminal defence lawyers that they have to be aware of the impact of detention on the client's social life and his emotional and physical well-being. Under these circumstances, the criminal defence lawyer has to be aware of the fact that he is not only to offer legal assistance, but also may need to offer emotional and practical support. This support could include regular visits to the detained client, making sure that the client has a change of clothes and receives medical attention, if

necessary. The German Statements emphasise that it is important that the criminal defence lawyer responds immediately to a request to accept a case; the Belgian Salduz Code and the Dutch Protocol and Guidelines also emphasise that it is important that the lawyer responds to a call for legal assistance as soon as possible. Moreover, the German Statements remind the lawyer that conversations and written correspondence with the detained client about the acceptance of a case should not be subjected to surveillance.

With regard to the issue of a defence lawyer withdrawing from a criminal case, all regulations emphasise that the criminal defence lawyer needs to ensure his withdrawal does not negatively affect the interests of the accused. Additionally, only the English regulations emphasise that particularly when circumstances require the lawyer to withdraw from the case close to trial, the lawyer not only owes professional duties to the accused, but also to the court. These duties to the court, however, should not affect the lawyer's duty of confidentiality to his client, which means that the lawyer will not always be able to provide a satisfactory explanation to the court for his reasons for withdrawal. The German Statements make a distinction between withdrawal by a chosen and an appointed lawyer. An appointed lawyer should not accept a case when it is clear to him that the accused does not want to be represented by him, particularly when due to the circumstances of the case a proper defence cannot be guaranteed.

With regard to the defence of co-accused, only the Scottish regulations and the Belgian Salduz Code explicitly advise defence lawyers not to take on the defence of more than one accused in the same case to avoid inevitable conflicts of interests and possible breaches of confidentiality. The German Statements do not explicitly provide regulations concerning the defence of more than one accused by the same lawyer. The Statements do, however, mention the possibility of a joint defence of multiple accused in the same case by different lawyers. These lawyers are allowed to coordinate their work, but they should always put their own client's interests first. The other regulations clearly state that defending co-accused is possible, but only with the informed and written consent of all accused. As soon as a conflict of interests arises, the lawyer will have to withdraw and the cases have to be transferred to separate lawyers. The Dutch and English regulations remind the criminal defence lawyer (and therewith also the judicial authorities) that it is his responsibility to determine whether an actual or possible conflict of interests exists. This means that the authorities will have to grant access to all accused. With regard to the defence of co-accused, the PDS issued very detailed and practice-based guidance for PDS advocates on how to protect confidentiality when different PDS advocates are instructed to act for co-accused with conflicting interests.

Lastly, regarding the use of interpreters during lawyer-client communication, only the English regulations provide some guidance to criminal defence lawyers. Lawyers have to ensure that the accused's needs for an interpreter are met. When the services of police

station interpreters are used, lawyers are advised to take extra precaution, particularly with regard to the interpreter's duty of confidentiality regarding lawyer-client communication.

2.10.2 The Criminal Defence Lawyer as Strategic Adviser

The Dutch Statute and the Austrian Basic Principles emphasise that the accused's interests always prevail over the interests of the criminal investigation. The lawyer should thus have full and timely access to case materials. The German Statements also impose a responsibility on the criminal defence lawyer himself: as soon as he has accepted a case or has become aware of his appointment in a case, he will have to seek full access to the case file. Additionally, the French report on the first Definition of the Role of the Lawyer during Police Custody and the Belgian Salduz Code stress that the criminal defence lawyer should be granted full access to case materials as soon as possible. Without this information it will be difficult if not impossible to properly advise the suspect on his defence strategy prior to the police interrogation. The Scottish regulations prohibit solicitors from providing their clients with copies of case material where it concerns particularly sensitive information such as witness statements of victims of sexual offences. This means that in Scotland accused under certain circumstances are fully dependent on legal assistance when preparing the defence because they are not allowed to obtain copies of case material themselves.

According to the Dutch Statute, a criminal defence lawyer should be allowed to contact (potential) witnesses, experts and third parties also pre-trial in order to conduct an investigation for the defence. The word 'should' is used intentionally, referring to the former general code of conduct for lawyers, which prohibited criminal defence lawyers from having any contact with witnesses for the prosecution pre-trial. In the current general code of conduct, this provision has been removed. Austrian and German criminal defence lawyers are allowed to conduct an investigation for the defence, for example, by contacting witnesses and by visiting crime scenes. German criminal defence lawyers are explicitly advised to carefully document all their activities concerning the investigations conducted for the defence and calling witnesses who they know will provide false statements or relying on documents of which the lawyer knows that they are forged are proscribed. The Austrian Basic Principles remind criminal defence lawyers that they can never be forced by the accused to follow a certain line of investigation. Scottish solicitors are allowed to contact witnesses pre-trial and according to the Scottish regulations, they have a professional duty to properly prepare witnesses for their appearance in court. Similar regulations can be found in England and Wales, where traditionally solicitors are allowed to contact witnesses pre-trial and take their statements, which can later be used in evidence in favour of the defence. Currently, English barristers, although they are traditionally not allowed to have any contact with witnesses at all during the pre-trial phase, are allowed to contact witnesses pre-trial. This is

even encouraged, but only to the extent of witness familiarisation so that witnesses know what to expect when they are called to testify in court, which will be beneficial to the expediency of the trial.

Furthermore, the starting point of the Dutch Statute is that the accused takes the final decision on the defence strategy; the criminal defence lawyer only advises the accused on the possible defence strategies. If the lawyer disagrees with the accused's decision to such an extent that he is no longer able to defend the accused in a partial manner, he will have to withdraw from the case as long as this will not disproportionally disadvantage the accused in his defence. In the course of preparing the defence, the Austrian Basic Principles prescribe that the criminal defence lawyer has to constantly keep his client informed of matters which are relevant for making decisions about the defence strategy. Thus, it follows from the Austrian as well as the Dutch regulations that decisions on the defence strategy are ultimately made by the accused on the lawyer's advice. Also the Belgian Salduz Code explicitly provides that the suspect is *dominus litis* of the defence strategy. According to the German Statements, the client's instructions are not binding on the criminal defence lawyer, although he will have to confer with his client about the defence strategy and if they cannot come to an agreement about the defence strategy, the criminal defence lawyer either withdraws from the case, or if he decides to continue to represent this client, he will have to take into account all circumstances and is never allowed to act against the client's wishes. At the same time, the Statements provide that the German criminal defence lawyer is not allowed to cooperate in constructing a defence strategy which leads to the client's conviction, only to cover for someone else.

Lastly, with regard to the criminal defence lawyer's role as strategic adviser, the English regulations pay particular attention to disclosure of defence statements. It is common practice in England and Wales that prosecution disclosure is made dependent on the level of defence disclosure. According to the English regulations, it is the criminal defence lawyer's duty to ensure that the duty to disclose defence statements is not in violation of the accused's right to be presumed innocent and his right not to incriminate himself. In this regard, also the lawyer's advice on plea bargaining is discussed at length in the English regulations. As long as there is no full prosecution disclosure, taking a plea is a very delicate issue. Lawyers are advised to maintain open communication with both clients and the court in order to ensure that the accused has the most benefit from his plea of guilty. This open communication should prevent the court from holding the accused accountable for entering a plea of guilty at a later stage in the proceedings if this is caused by lack of full prosecution disclosure early in the proceedings. The English PDS Code of Conduct also explicitly urges PDS lawyers never to put their client under pressure to plead guilty and never to advise pleas of guilty unless they are satisfied that the prosecution can actually prove the charges.

Handling the case through out-of-court settlement is also addressed by the Austrian regulations. According to these regulations it is the criminal defence lawyer's duty to actively explore and pursue all possibilities of settling the case out of court, as long as this is done in consultation with the accused. Similar regulations can be found in the German Statements. Settling the case by agreement with the prosecutor and the court can be a useful defence strategy according to the Statements. Every decision made within the scope of settlement proceedings has to be made in consultation with the client and the German criminal defence lawyer can only initiate settlement proceedings with the client's prior consent. It is the criminal defence lawyer's duty to inform the client of all the risks and possible consequences of the settlement, but clients should also be aware that any confession they make as part of settlement proceedings is made under their own responsibility. No specific guidance or regulations on out-of-court settlement proceedings are found in the Netherlands or Scotland.

2.10.3 The Criminal Defence Lawyer as Trusted Counsellor

All regulations emphasise that confidentiality is an essential prerequisite for a solid lawyer-client relationship. Therefore, it is the lawyer's professional duty to protect the confidential character of lawyer-client communication, particularly when his client is detained. The Salduz regulations discuss the issue of confidentiality primarily in connection with providing legal assistance prior to the interrogation: the accused person is entitled to confidential communication with his lawyer prior to the interrogation.

Moreover, all regulations provide that confidential information may only be published with the accused's explicit consent. The Dutch Statute is furthermore very clear on the fact that the final responsibility regarding the decision whether and, if so, how to publish confidential information lies with the lawyer, so that a lawyer can never be forced by his client to publish certain information. The English regulations pay particular attention to the use of social media by lawyers and warns lawyers to be very careful when sharing information through social media channels. Confidentiality is very easily breached, often not intentionally, for example when checking in on Facebook at a certain location for a meeting with a client. This might already provide third parties with sensitive and confidential information. Moreover, as soon as information is shared online through social media platforms, the information can no longer be controlled.

The Dutch national Bar Association issued extensive separate guidance for lawyers on how to act when their premises are being subjected to search and seizure and when lawyer-client communication is conducted by telephone. This guidance is very detailed and practice-based and aimed at the protection of confidentiality and legal professional privilege. Similar to the Dutch Statute, England and Wales have issued specific guidance for barristers who

have been instructed as independent counsel to safeguard the privileged character of certain information when law firms are being searched. These barristers acting as independent counsel are accountable to the investigating authorities, which means that confidential communications which are made directly to these independent counsel during the search might have to be communicated to the investigative authorities. Lawyers should therefore be very careful about what to share with these independent counsel. Apart from the Dutch and English regulations mentioned above, no specific regulations on this subject were identified in Scotland, Germany or Austria.

The German Statements provide that the criminal defence lawyer's duties to the finding of truth are limited by his duty to protect his client's interests. This provision particularly refers to the lawyer's duty of confidentiality: the lawyer is obliged to only tell the truth, but he cannot be forced to share all information which he knows to be true.

Lastly, the issue of acceptance of a case through third parties, including payment by those parties, is addressed by the Dutch, German and Scottish regulations. According to the Dutch Statute, payment by third parties is acceptable to the extent that it does not influence the lawyer's partial and independent position and only if the client consents. In practice, this means, for example, that the lawyer should not accept such payments if this means that he will have to provide the third party with confidential information. In this regard the Scottish regulations also require the lawyer to always check with the accused on whether he actually wishes to be represented by him. The German Statements also allow payment of fees by third parties, provided that the lawyer consults the client about this situation; that the client agrees to it; and that the lawyer will always give priority to his client's interests and makes sure that the third party is aware of this.

2.10.4 The Criminal Defence Lawyer as Spokesperson

The criminal defence lawyer's role as spokesperson concerns his performance in the media and his performance in court. Regarding the lawyer's performance in the media, the Austrian regulations are unique in promoting proactive use of media exposure in criminal cases as part of the defence strategy, particularly when it concerns a high-profile criminal case. The English, German and Dutch regulations are more reserved and advise the criminal defence lawyer to avoid a trial by media. Particularly in England and Wales where criminal trials in the Crown Court are decided by juries, proceedings could easily be undermined if the media is actively involved while the case is still *sub judice*. Sharing (confidential) information with the media is not prohibited in England and Wales and the Netherlands, but it can only be done with the accused's explicit consent and all interests involved should be carefully balanced before making the decision to contact the media. In this regard, the interests of the accused have to be paramount. According to the German Statements, criminal defence lawyers are

not allowed to give the media access to case material and briefing the media about a case is only considered to be in the interests of the defence in very exceptional circumstances, for example if media coverage is harmful to the presumption of innocence of the client or to his reputation.

Moreover, lawyers are urged to keep control over the information they share with the media. For example, the Dutch regulations advise the lawyer to request a draft of the article when publishing information in printed media. The lawyer should ensure that he can alter the draft before publication. In the English regulations for barristers, it is also emphasised that printed media is easier to control than for example television broadcasts or expressions of opinions on social media. The regulations in Scotland do not specifically refer to the role of the lawyer in the media.

Regarding the criminal defence lawyer's role as spokesperson for the accused in court, only the Dutch regulations provide specific guidance. According to these regulations, it is paramount that nothing the lawyer says can be held against the accused, and the lawyer should therefore be free to say anything as long as this is in the accused's best interests. At the same time the lawyer is not allowed to knowingly mislead the court[439] and he is not allowed to make unfounded allegations against third parties or cause unnecessary harm to others.

3 Relevant Regulations for Criminal Defence Lawyers in General Codes of Conduct

The purpose of this research is to identify specific rules of conduct governing criminal defence lawyers when assisting accused persons in criminal proceedings. Such regulations are found in specific sets of rules of conduct for criminal defence lawyers as outlined and discussed in paragraph 2 of this Chapter. Additionally, relevant regulations were identified in general codes of conduct for lawyers. These regulations are mapped out and analysed in this paragraph.

As explained in the introduction to this Chapter, the four roles of criminal defence lawyers were broken down in separate relevant aspects. These separate aspects are reflected in the subparagraphs below. Each subparagraph follows the same structure.

First, the *specific* regulations applicable to criminal defence lawyers as identified in the general codes of conduct are cited and discussed. Such regulations were identified in the general codes of conduct of Belgium (Flanders and Wallonia), Croatia, Cyprus, Estonia,

[439] The rule of conduct that lawyers should not knowingly mislead the court is a general rule, which is also found in general codes of conduct. This will therefore also be more thoroughly discussed in paragraph 3.3.

France, Ireland (barristers and solicitors), Italy, Latvia, Lithuania, the Netherlands, Scotland (solicitors), Slovenia, Sweden and England and Wales (barristers). Second, relevant *general* rules of conduct which, although they do not specifically refer to legal assistance in criminal proceedings, are still relevant for criminal defence lawyers in determining their conduct when assisting accused persons in criminal proceedings are described. Third, each subparagraph closes with preliminary conclusions. Similar to paragraph 2, this paragraph 3 concludes with a concise summary of the relevant regulations as they have been identified in the general codes of conduct structured per role in order to support an integrated synthesis in Chapter 4.

3.1 The Criminal Defence Lawyer as Legal Representative

3.1.1 Acceptance of, Refusal of, and Withdrawal from a Case in Criminal Proceedings

The general codes of conduct of Croatia, Cyprus, Estonia, Ireland (barristers), Italy, and Slovenia contain specific provisions for the acceptance of, refusal of, and the withdrawal from cases in criminal proceedings. The Croatian code states:

> "An attorney shall not refuse to render legal assistance in a criminal case because it is difficult to win, because there is some irrefutable evidence that a criminal offense has been committed, because the client has admitted his or her guilt, because of the severity of a particular criminal offense, because of public opinion or in any other similar situation."[440]

Withdrawal from a criminal case is thus only possible when 'professional conscience' prevents the Croatian criminal defence lawyer from pursuing the defence,[441] unless withdrawal would cause harm to the accused's position or if it is impossible for the accused to find another lawyer.[442] The Estonian code of conduct is even stricter:

> "The advocate may not withdraw from any agreed or court-assigned obligation to protect the suspect or the accused."[443]

The Cypriot code of conduct, under the paragraph 'Relations with judges' is more nuanced:

[440] Attorneys' Code of Ethics 1999, Art. 63.
[441] Attorney's Code of Ethics 1999, Art. 65.
[442] Attorney's Code of Ethics 1999, Art. 64.
[443] Code of Conduct of the Estonian Bar Association 1999, Art. 19 § 1. The agreement refers to a negotiated contract for legal assistance according to § 2 of this provision.

> "[…] advocates have a duty to undertake the defence of any person accused of a crime, irrespective of their personal opinion on whether the accused is guilty or innocent."[444]

The fact that this provision is placed under the heading 'Relations with judges' may imply that it concerns court-appointed representation of accused persons. Particularly since the 'duty to undertake the defence' is put in perspective by the provision that lawyers are free to:

> "[…] undertake or refuse to undertake cases without providing any justification, *with the exception of cases entrusted to them by the Court*, where such refusal must be adequately justified." [445] [author emphasis added]

Thus only when it concerns an appointment by the Court, may the Cypriot lawyer be obliged to provide justification for refusing the case; put differently, only when the lawyer is appointed by the court, does he have a duty to undertake the case or provide justification if he refuses. In all other circumstances the Cypriot (defence) lawyer is allowed to undertake or refuse to undertake a case without any justification. With regard to refusal of undertaking cases, the Cypriot code emphasises that lawyers should not accept a case when this would not allow them 'moral freedom to act'.[446] The code, however, does not explain what is meant by 'moral freedom to act' and to what extent this differs from the term 'personal opinion'.

A similar provision, which requires court-appointed counsel for the defence to provide justification for refusal or withdrawal from a case can be found in the Italian code of conduct:

> "[…] A lawyer enrolled in the list of the defending counsels nominated by the court, once appointed, cannot refuse to provide representation or interrupt it without justification. A lawyer enrolled in the list of the defending counsel appointed by the State is allowed to refuse or withdraw from the representation requested by a less prosperous person only with justification."[447]

The Slovenian code of conduct provides that a lawyer:

[444] Advocates' Code of Conduct Regulations of 2002, Art. 33 § 11.
[445] Advocates' Code of Conduct Regulations of 2002, Art. 33 § 10.
[446] Advocates' Code of Conduct Regulations of 2002, Art. 33 § 10.
[447] Code of Conduct for Italian Lawyers 2014, Art. 11 §§ 3-4.

> "[…] shall not refuse to plead a client for the mere fact that the pleading is difficult, for instance due to the acceptance of guilt, the pieces of evidence, the nature or weight of the criminal act, the response in
> public or for similar reasons. If the lawyer nevertheless refuses the pleading, he shall try to secure the
> pleading for the client by another lawyer, in particular if it is the client's wish. In principle the lawyer shall not refuse an already accepted pleading, in particular not:
> - if this would worsen the client's position of defendant,
> - if at a certain point of the proceedings it is impossible to get another lawyer immediately or
> - if as the client's lawyer he failed in his process and pleading proposals." [448]

This provision shows much similarity with the Croatian provision because it also explains to the lawyer that a case should not be refused merely because it will be a difficult case on the basis of a plea of guilty or overwhelming evidence. The Slovenian code of conduct does not provide any admissible reasons to refuse a case like the Cypriot code of conduct, but similar to the Croatian provisions, it emphasises that refusal is only possible if this is not detrimental to the accused's position and only if it is still possible to transfer the case to another lawyer. According to the wording of the provision, refusal or withdrawal of a case is impossible if this would leave the accused unrepresented.

Lastly, the code of conduct for the Bar Association of Ireland provides that barristers are obliged to:

> "[…] defend any accused person on whose behalf they are instructed irrespective of any belief or opinion they may have formed as to the guilt or innocence of that person." [449]

Moreover, if they have accepted a criminal case, Irish barristers are not allowed to accept any other cases which might cause conflicts with the person whose case they have accepted.[450] If, due to unforeseen circumstances, the barrister has to be absent for a limited period of time during the defence, he will have to make sure that the accused is represented by another barrister.[451] A barrister is only allowed to withdraw from a criminal case when he

[448] Code of Professional Conduct of the Bar Association of Slovenia 2001, Art. 40.
[449] Code of Conduct for the Bar of Ireland 2019, Art. 10.15.
[450] Code of Conduct for the Bar of Ireland 2019, Art. 10.1. A brief in a criminal case takes precedence over all other commitments likely to coincide with obligations owed to the person whose criminal case has been accepted by the barrister, this follows from the Code of Conduct for the Bar of Ireland 2019, Arts. 10.2 and 10.3.
[451] Code of Conduct for the Bar of Ireland 2019, Art. 10.6.

believes this to be in the best interests of the accused[452] and if the client is in custody the barrister may "not withdraw from the client's case without obtaining permission from the court before which that client is next scheduled to appear.[453]

3.1.1.1 Relevant General Rules of Conduct regarding the Acceptance of, Refusal of, and Withdrawal of a Case

In all general codes of conduct, regulations can be found prescribing that lawyers are not allowed to accept cases when, for example, they are not competent (knowledgeable) to handle the case or not in a position to handle the case in a timely manner, for example, because of an excessive workload. Acceptance of a case is also not advised when this would cause the lawyer to have to breach his duty of confidentiality regarding another client or because it would compromise his independence. Regarding the lawyer's professional competence, most general codes of conduct provide that lawyers are obliged to keep their legal knowledge and expertise up to date (continuing professional development). Lastly, regarding the issue of withdrawal from a case, most general codes of conduct emphasise that the lawyer should carefully consider the consequences of his withdrawal for his client's position. Withdrawal should not cause the client to remain unrepresented against his will. This means, for example, that the lawyer is obliged to ensure that he is replaced by another competent lawyer and at least notify the client in time of his intention to withdraw so that the client is able to find a substitute lawyer.

Specific criteria for the acceptance of, refusal of, or withdrawal from a case differ between the EU Member States. Comparable to the regulations outlined in paragraph 3.1.1, a dichotomy is visible in approach regarding appointed lawyers and chosen lawyers. The Finnish code of conduct, for example, provides that a lawyer has to request permission to withdraw if he has been assigned by the court or another authority.[454] The Polish code of conduct seems to link the principle of confidentiality and trust to the concept of appointed counsel, by providing that an advocate should never use the client's loss of confidence in his performance as his legal representative as an excuse to withdraw from representation.[455] This already touches upon the possible ethical challenges with which the lawyer may be confronted when being appointed to represent a client. The Czech code of conduct explicitly

[452] Code of Conduct for the Bar of Ireland 2019, Art. 10.16.
[453] Code of Conduct for the Bar of Ireland 2019, Art. 10.4.
[454] Code of Conduct for Lawyers 2009, Art. 5.10.
[455] Rules of Ethics for Advocates and the Dignity of the Profession (Code of Ethics for Advocates) 2011, Paragraph 51.

provides that the court-appointed lawyer has to proceed with the same "conscientiousness and care" as he would in other cases.[456]

Other codes of conduct do not make a distinction between appointed and chosen lawyers when it comes to the acceptance or refusal of cases or withdrawal from a case. For example, the Latvian code of conduct provides that a lawyer may refuse to act in a case in which he has not agreed to act.[457] Similarly, Scottish solicitors, Spanish lawyers, and Swedish lawyers are free to accept or refuse a case.[458] They also do not have to provide any justification for their decision. According to the Lithuanian code of conduct, a lawyer may only refuse a case due to important reasons.[459] The code does not explain those reasons which are regarded as important nor does it explain whether lawyers have to justify those reasons. A Maltese lawyer is "generally free to decide whether to accept instructions from any particular client"[460] and Danish lawyers are urged to only accept instructions directly from the client, another lawyer on behalf of the client, or public authority or other competent body.[461] The Dutch lawyer has a significant amount of freedom to handle a case as he sees fit according to the specific circumstances of the case.[462] Lastly, the code of conduct for English barristers explicitly provides a list of circumstances in which instructions should not be accepted by the barrister. For example, when accepting instructions would constitute a real risk to a conflict of interests or when this would most probably cause the barrister to lose his independent position.[463] Moreover, a self-employed barrister has to accept instructions from a professional client irrespective of his beliefs or opinions regarding the character, representation, cause, conduct, guilt or innocence of the lay client, provided that he is sufficiently skilled and has adequate time to handle the case.[464] This is known as the 'cab rank Rule'.

3.1.1.2 Concluding Remarks

Regarding the matter of acceptance of, refusal of, and withdrawal from a case, specific regulations were found in the general codes of conduct of six EU Member States: Croatia, Cyprus, Estonia, Ireland (barristers), Italy, and Slovenia. These regulations have in common

[456] Rules of Professional Conduct of the Czech Republic 1996, Art. 6 § 2.
[457] Code of Ethics of Latvian Sworn Advocates 1993, Art. 2.2.
[458] Code of Conduct for Scottish Solicitors 2002, guidance to Art. 5 (a); the Law Society of Scotland Practice Rules 2011, Art. 1.5.2; Code of Conduct of the Spanish Bar 2001, Art. 13 § 3; Code of Professional conduct for Members of the Swedish Bar Association 2008, Art. 3.1.
[459] Code of Professional Conduct for Advocates of Lithuania 2005, Art. 6.8.
[460] Code of Ethics and Conduct for Advocates (year unknown), Chapter II, rule 1.
[461] Code of Conduct for the Danish Bar and Law Society 2011, Art. 8.
[462] Rules of Conduct 2018, guidance to rule 13.
[463] BSB Handbook Version 4.3 (2019), Rule rC21.
[464] BSB Handbook Version 4.3 (2019), Rules rC29-30.

that they urge lawyers to accept criminal cases irrespective of personal beliefs, the amount of evidence, the severity of the alleged offence and the client's presumed guilt. Moreover, according to these specific regulations, withdrawal from criminal cases is only possible when this is in the interests of the client or for good reasons. Thus, these regulations underline the professionally independent, yet partial position of the criminal defence lawyer. The Estonian regulations oblige lawyers to accept the case when they have been appointed by the court to represent an accused person and the Cypriot and Italian regulations require the appointed lawyer to provide sufficient justification for refusal of or withdrawal from a criminal case in which they have been appointed by the court. Based on a cursory reading, these regulations might put the criminal defence lawyer's independence towards to the courts and the lawyer-client relationship under pressure, in particular when the accused person does not want to be represented by a lawyer. At the same time, such interpretation is very premature, since it will also depend on the organisation of the criminal justice system. When, for example, the criminal justice system uses obligatory representation as a starting point, deontological regulations as the Estonian and Cypriot described above seem a necessary consequence of this system.

All codes of conduct generally provide that lawyers should only accept a case when they are sufficiently competent and practically able to handle the case. In the general codes of conduct of at least 12 Member States specific criteria for acceptance of, refusal of, and withdrawal from a case were identified. In 3 of these 12 Member States, namely the Czech Republic, Finland, and Poland, these regulations make a distinction between appointed and chosen lawyers. According to these regulations, appointed lawyers are not able to refuse a case unconditionally. The Polish regulations aptly address the delicate issue of the principle of confidentiality and mutual trust between the client and the lawyer in the situation where the lawyer is appointed. When the lawyer, for any reason, encounters problems in the lawyer-client relationship, he might find himself in an awkward professional split when he is forced by deontological regulations to accept a case, due to the fact that he has been appointed by the court (or another authorised body). Deontological challenges in this regard include, for example, the question whether the lawyer is still able to maintain his independence. What should he do when the client does not want to be represented by him, or not at all? Should he in that case still obey his assignment and represent the client against his wishes? How does that relate to the lawyer's independent position? How can an appointed lawyer build a confidential relationship with a client who does not want to be represented? Moreover, under such circumstances it is highly likely that he will not receive any instructions from the client at all. How should the lawyer in that case proceed? Can he conduct a defence without any consultation with the client? It has already been explained above that these questions have to be explained against the background of the criminal

justice system in which these deontological regulations have to function, which means that the questions can only be raised at this point but not yet answered.

In the remaining 9 of the 12 Member States, namely Denmark, England and Wales, Latvia, Lithuania, Malta, the Netherlands, Scotland, Spain, and Sweden, the regulations identified do not make a distinction between appointed and chosen lawyers. These regulations provide that the lawyers are free to accept or refuse a case, although refusal may be subject to certain conditions. The dichotomy that has been made visible in this paragraph between States which make a distinction between appointed and chosen lawyers and States that do not make such a distinction is further addressed in Chapter 4.

3.1.2 Dominus Litis: Who is in Charge of the Defence?

The issue of *dominus litis* deals with questions, such as who is in charge of the defence? Who decides which defence strategy should be followed, the criminal defence lawyer or the accused? Who determines, for example, if and, if so, which witnesses will be called to give statements in court? And what if the client is determined on calling a particular witness and the lawyer does not believe that the witness's statements will be supportive to his client's case? Another example would be the situation in which the client confesses to his lawyer that he has not committed the alleged offence and even more so that he knows who did commit the offence, but that he still decides not to construct an active defence because he wants to protect the real perpetrator. What should the lawyer do in such a situation? Should he follow the wishes of his client and conduct the defence on the basis of a plea of guilty, or should he 'protect' his client against himself and independently decide to construct an active defence strategy based on the client's innocence?

It is one of the core professional duties of the lawyer to act in the best interests of his client; however, who decides what actually is in the best interests of the client: the lawyer or the client himself? The subject of *dominus litis* is complicated and the practical implications are highly dependent on the norms and values of the individual criminal defence lawyer. In the context of this research, it is therefore relevant to determine whether there are rules in the general codes of conduct which may serve as guidance to the criminal defence lawyer in determining his position with regard to the issue of *dominus litis*.

The general codes of conduct of Croatia, Estonia, Ireland (barristers), Lithuania, Malta, and Scotland contain specific provisions regarding the issue of *dominus litis* in criminal proceedings. According to the Croatian code of conduct the criminal defence lawyer is:

> "[…] not bound by the instructions received by the client regarding legal matters. The defence counsel shall have the obligation to abide by the instruction received by the defendant concerning facts only."[465]

Similarly, the Estonian code of conduct differentiates between factual and legal matters:

> "[…] The advocate shall not be bound by the position of his client when rendering a legal opinion on the accusations made against his client, however, he shall inform the client about the defence position."[466]

The Lithuanian code of conduct is quite clear about the criminal defence lawyer's position in relation to the accused:

> "Although an independent participant of the proceedings in criminal cases an advocate may not select any position of defense without a client's awareness. An advocate shall consult a client and take due regard of his reasoning and arguments."[467]

The Maltese code of conduct describes the position of the criminal defence lawyer as a spokesperson for the accused:

> "An advocate who appears in court for the defence in a criminal case is under a duty to say on behalf of the client what the client should properly say for himself or herself if the client possessed the requisite skill, knowledge and legal training."[468]

The Irish code of conduct for barristers states:

> "Every accused person has the right to decide whether to give evidence in his or her own defence. Barristers may properly advise their client upon this but the accused themselves must make such decision."[469]

When comparing these regulations, it becomes clear first of all that the Lithuanian and the Irish code of conduct use the accused's perspective as a starting point, while in the other codes the lawyer's perspective is leading. The Irish code is also very clear that the accused

[465] Attorney's Code of Ethics 1999, Art. 72.
[466] Code of Conduct of the Estonian Bar Association 1999, Art. 19 § 3.
[467] Code of Professional Conduct for Advocates of Lithuania 2005, Art. 6.9.
[468] Code of Ethics and Conduct for Advocates (year unknown), Part 4, Chapter 1, Art. 10.
[469] Code of conduct for the Bar of Ireland 2019, Art. 10.13.

takes the final decision, in other words the accused is *dominus litis*. It has to be noted, though, that this only concerns a specific aspect of defence strategy, namely the decision whether to give evidence or not. In contrast, the Maltese code of conduct presents the lawyer as the spokesperson of the accused, without explicating who decides on what the lawyer precisely will say on behalf of the client. The wording of the relevant provision, however, seems to imply that the lawyer leads the defence.

The Lithuanian code of conduct is less clear on who is *dominus litis* of the defence, although it emphasises that the lawyer has to continuously confer with his client and take the client's reasoning into account. Who leads in taking the final decisions does not become clear from this provision. In contrast, the Irish code of conduct clearly states that the lawyer only advises the client, so that the client can make a properly informed decision about his defence position. The Croatian and the Estonian code of conduct differentiate between legal and factual arguments: regarding legal matters, the criminal defence lawyer is not bound by the client's instructions or defence position. Only the Croatian code explicitly refers to the lawyer's obligation to abide by the client's instructions regarding the facts. This distinction implies that when it concerns the issue of who decides on the defence strategy, it depends on whether this strategy is based on legal or factual arguments. At the same time, it is questionable whether such a distinction is tenable in practice since factual and legal arguments are often very much intertwined.

3.1.2.1 Relevant General Rules of Conduct regarding the Issue of Dominus Litis

General rules of conduct that are explicitly linked to the issue of *dominus litis* were identified in the general codes of conduct of Finland, Ireland (solicitors), the Netherlands, Poland, Slovenia, Spain, and Sweden. The Dutch[470] and Polish[471] code explicitly provide that the lawyer is fully accountable for the way in which the case is conducted. Additionally, these regulations provide that the lawyer should withdraw from the case when a dispute arises between the lawyer and the client about the conduct of the case.[472] A similar provision regarding the withdrawal of the lawyer in case a disagreement exists about how the case should be handled can be found in Finland[473] and Spain.[474] A Finnish lawyer will have to obtain the client's approval to make important decisions, unless the matter is urgent and needs immediate action.[475] The Slovenian code of conduct provides that the lawyer "shall

[470] Code of Conduct 2018, Rule 14 § 1.
[471] Rules of Ethics for Advocates and the Dignity of the Profession (Code of Ethics for Advocates) 2011, Art. 14.
[472] Code of Conduct 2018, Rule 14 § 1; Code of Ethics for Advocates 2011, Art. 57.
[473] Code of Conduct for Lawyers 2009, Art. 5.9.
[474] Code of Conduct of the Spanish Bar 2001, Art. 13 § 3.
[475] Code of Conduct for Lawyers 2009, Art. 5.5.

inform his client in advance of the course of the procedure to be followed in his case".[476] When compared to the Finnish regulation, it is clear that the client in Finland potentially has a larger influence on the conduct of the case than the Slovenian client, since the latter is only informed of the course of proceedings and as such only passively involved in the conduct of his case. An indication for the client as *dominus litis* can be found in the Irish code of conduct for solicitors:

> "A solicitor owes a duty to a client to disclose all relevant information to him. This follows from the fact that the solicitor is the agent of the client, who is the principal."[477]

Lastly, the Swedish Bar Association emphasises the lawyer's independent position towards his client:

> "[…] an advocate must assume an unreserved and independent attitude towards the client so as to act in line with the law and good advocate conduct but also to provide the client with an impartial advice and representation and not the advice and representation favoured by the client."[478]

3.1.2.2 Concluding Remarks

In 6 Member States the general codes of conduct contained specific regulations regarding the issue of *dominus litis* in criminal proceedings, namely Croatia, Estonia, Ireland, Lithuania, Malta, and Scotland. Additionally, relevant general regulations were identified in the general codes of conduct of 7 Member States, namely Finland, Ireland, the Netherlands, Poland, Slovenia, Spain, and Sweden. The wording of the regulations is very diverse, which makes it difficult to categorise these regulations.

It has been established that the Maltese, Irish, and the Finnish provisions take as a starting point the client's position in determining the strategy on how to conduct the case. The other provisions are less clear on who decides on the defence strategy, although these provisions have in common that they refer to the independent position of the lawyer in relation to the accused. The codes of conduct of the Netherlands, Poland, Finland and Spain contain provisions prescribing to the lawyer to withdraw in case of an unsurmountable disagreement with the client about the defence strategy. This shows the independent position of the lawyer

[476] Code of Professional Conduct of the Bar Association of Slovenia 2001, Section 45.
[477] A Guide to Good Professional Conduct for Solicitors 2013, Art. 3.2, 3rd paragraph.
[478] Code of Professional Conduct for Members of the Swedish Bar Association 2008, Commentary to Rule 1 (p. 6).

towards his client: the latter can never dictate the lawyer's position. The lawyer's independent position is even more explicitly stressed in the wording of the Lithuanian and Swedish provisions. The Lithuanian uses this starting point to illustrate the lawyer's independent yet partial position towards his client, whereas the Swedish provision uses it to underline the lawyer's obligation to provide impartial and independent advice to his client and not let himself be led by his client's preferences. Lastly, the provisions in the Croatian and Estonian codes of conduct relate the lawyer's independence to the distinction between legal and factual arguments. When it concerns legal arguments, the lawyer should operate completely independently from the client, only when it concerns factual arguments is the lawyer bound by the instructions received from the client.

3.1.3 Defending Co-Accused

When considering the subject of defending co-accused, the central question is whether the criminal defence lawyer is able to maintain his independent and partial position and to uphold his duty of confidentiality towards all accused involved. An important aspect in this regard is whether the lawyer is allowed to defend co-accused, knowing that a conflict of interests between the accused exists or might arise in the future. It should be noted, however, that the existence of a (potential) conflict of interests in itself does not necessarily mean that a joint defence of co-accused is out of the question. The common interests of the co-accused might outbalance a (potential) conflict, so that the accused prefer to be represented by the same lawyer.[479] The issue of *dominus litis*, as discussed in the previous paragraph, also plays an important part here: who decides what is in the best interests of the accused? Is it the accused or the lawyer? Moreover, it is not always a straightforward matter to determine whether there is a conflict of interests, let alone a *potential* conflict of interests. The Irish code of conduct for solicitors aptly describes when such conflict exists:

> "If a solicitor, acting with ordinary care, would give different advice to different clients about the same matter, there is a conflict of interest between those clients and the solicitor should not act for both."[480]

An important factor in allowing criminal defence lawyers to defend co-accused therefore is that the lawyer is able to identify whether there is a (potential) conflict of interests between the accused, consequently to establish whether this conflict stands in the way of an effective,

[479] Prakken & Spronken (eds.) 2009, p. 267.
[480] A Guide to Good Professional Conduct for Solicitors 2013, Art. 3.2, 1st paragraph.

independent and partial defence for all co-accused, and finally to determine whether each individual accused is able to make an informed and voluntarily decision on the joint defence.

In the general codes of conduct of Croatia, Ireland (barristers), Italy, Poland, Scotland, and Sweden, specific provisions regarding defending co-accused in criminal proceedings were identified. According to the Croatian code of conduct:

> "An attorney shall not undertake the representation of a co-plaintiff or a co-defendant if their interests are in conflict."[481]

Additionally, the Croatian code of conduct provides regulations regarding the defence of co-accused when each accused is represented by a different lawyer. The lawyers should try to coordinate their work as much as possible and the innocence of their own clients should not be established by blaming one of the other accused unless there is no other defence available.[482] Similar to the Croatian regulations, the Irish code of conduct for barristers provides:

> "Barristers may appear for more than one defendant in a criminal trial provided they have satisfied themselves that there is no conflict of interest."[483]

Also the Swedish code of conduct shows much resemblance:

> "[…] an Advocate must not accept a mandate if there exists a conflict of interest or a significant risk of a conflict of interest."[484]

A conflict of interests exists if "the Advocate is assisting another client in the same matter and the clients have conflicting interests".[485] However, according to the commentary to this general rule of conduct:

> "[…] it is permissible in an exceptional situation for a defence counsel to accept a mandate on behalf of two defendants in the same case if it is not immediately obvious that they have conflicting interests."

[481] Attorneys' Code of Ethics 1999, Art. 60.
[482] Attorneys' Code of Ethics 1999, Arts. 69-71.
[483] Code of Conduct for the Bar of Ireland 2019, Art. 10.10.
[484] Code of Professional Conduct for Members of the Swedish Bar Association 2008, Art. 3.2.1.
[485] Code of Professional Conduct for Members of the Swedish Bar Association 2008, Art. 3.2.1 § 2.

The commentary does not elaborate on what actually is considered to be an exceptional situation. It does follow from the Swedish regulations that a lawyer is not allowed to continue his representation of two accused persons in the same case if their interests actually conflict.

Where the previous regulations explicitly mention (potential) conflict of interests as a reason to prohibit representation of co-accused, the Italian code of conduct explicitly prohibits defence lawyers to defend more than one accused in the same or linked proceedings:

> "[…] A lawyer shall not defence more persons who are under investigations or accused and who have made accusatory declarations towards another person under investigation or accused in the same proceeding or in another linked or connected proceeding […]"[486]

No reference to conflicts of interests is made in this regulation. The Polish code of conduct makes yet another distinction. Although the Polish regulations do refer to (potentially) conflicting interests as a reason to prohibit representation of more than one client in the same case, representation of co-accused in criminal proceedings seems to be prohibited at all times, just like the Italian regulations:

> "1. Attorneys at law shall not advise: (1) the clients whose interests are contradictory to the interests of other clients in the same case or in a related case; or (2) the clients if their interests are contradictory in the same case or in a related case to the interests of other persons on whose behalf the attorney at law has practised.
> 2. The bans on advising, referred to in section 1 above, shall not apply if a client or clients […] gave their approval for such an action. Attorneys at law shall not however obtain such approval if they are or were a defence attorney in a criminal case on behalf of at least one of these persons […]."[487]

Lastly, the Scottish Practice Rules for solicitors provide:

> "Save in the most exceptional circumstances, you should not accept instructions to act for more than one accused or appellant."[488]

[486] Code of Conduct for Italian Lawyers 2014, Art. 49 § 2. When the lawyer acts in breach of this provision he can be disciplinary sanctioned with a suspension from practice for six to twelve months.
[487] Code of Ethics of Attorney at Law 2014, Art. 29.
[488] The Law Society of Scotland Practice Rules 2011, Section C, rule C4, § 4.4.26.

The Scottish rules do not provide any explanation on what are considered 'most exceptional circumstances'.

3.1.3.1 Relevant General Rules of Conduct regarding Representation of Clients with (possibly) Conflicting Interests

In addition to the specific regulations as set out above, the general codes of conduct were scrutinised for provisions relating to representation of more than one client in the same case in general. In all general codes of conduct, provisions were found prescribing that the lawyer should avoid any conflict of interests, while in none of these codes were provisions identified explicitly prohibiting representation of more than one client in the same case.

Furthermore regulations were identified providing guidance to lawyers regarding their conduct when assisting more than one client in the same case in the general codes of conduct of Belgium,[489] Bulgaria,[490] Cyprus,[491] Czech Republic,[492] Denmark,[493] Estonia,[494] Finland,[495] France,[496] Ireland,[497] Latvia,[498] Lithuania,[499] Luxembourg,[500] Malta,[501] the Netherlands,[502] Poland,[503] Romania,[504] Slovakia,[505] Spain,[506] and England and Wales[507]. These regulations can be roughly divided into two categories. The first category consists of regulations which prohibit representation of more than one client in the same matter when the interests of those clients are (potentially) conflicting: Bulgaria, Cyprus, Czech Republic, Denmark, Ireland (solicitors), Latvian, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia and Spain. In Poland this rule is very strict: even when all clients involved consent to the joint representation, the lawyer is not allowed to continue when a conflict of interests exists.

[489] Code de déontologie de l'avocat 2013, Art. 2.14; Codex deontologie voor advocaten 2018, Arts. 5 and 6.
[490] Attorneys-at-Law Ethics Code 2005, Art. 13.
[491] Advocates' Code of Conduct Regulations 2002, Art. 21.
[492] Rules of Professional Conduct of the Czech Republic 1996, Art. 7 § 3.
[493] Code of Conduct for the Danish Bar and Law Society 2011, Art. 12.
[494] Code of Conduct of the Estonian Bar Association 1999, Art. 13.
[495] Code of Conduct for Lawyers 2009, Art. 6.
[496] Réglement intérieur national de la profession d'avocat 1971, Art. 4.1.
[497] Code of Conduct for the Bar of Ireland 2019, Art. 3.16.
[498] Code of Ethics of the Latvian Sworn Advocates 1993, Art. 4.
[499] Code of Professional Conduct for Advocates of Lithuania 2005, Art. 3.
[500] Réglement intérieur de l'Ordre des avocates du barreau de Luxembourg 2013, Arts. 2.4.2.1 and 2.4.2.2.
[501] Code of Ethics and Conduct for Advocates (year unknown), Chapter V, Rule 1 and 3.
[502] Gedragsregels 2018, Rule 15.
[503] Rules of Ethics for advocates and the Dignity of the Profession 2011, Art. 46; Code of Ethics of Attorney at Law 2014, Art. 10.
[504] Statut de la profession d'avocat 2005, Art. 119.
[505] Rules of Professional Conduct for Lawyers 2004, Section 4.
[506] Code of Conduct of the Spanish Bar 2001, Art. 13 §§ 4 and 6.
[507] BSB Handbook Version 4.3 (2019), rC21 §§2-4 and gC69; SRA Code of Conduct 2018, paragraphs 6.1-6.2.

According to the Danish regulation, representation of more than one client in the same case is only prohibited if it concerns a conflict of a "not-insignificant nature". Still, the lawyer is only obliged to withdraw from the representation of the clients regarding whom he has received significant information. It is, however, not further clarified in the regulation what is considered to be significant. The Latvian regulation prohibits lawyers from representing clients with conflicting interests, unless it concerns representation "outside the Court". In the latter instance, joint representation is possible with the prior consent of all clients. The Latvian regulation, however, does not explicate what is meant by "outside the Court". The other regulations do not provide any exceptions.

The second category consists of regulations which allow representation of multiple clients in the same case even if they have (potentially) conflicting interests: Belgium, Finland, Estonia, France, the Netherlands, and England and Wales. According to these regulations, the lawyer has an increased responsibility to thoroughly inform the clients about the risks and consequences of a joint defence and the lawyer should also ensure that the clients understand his advice. Moreover, all the regulations require that the lawyer receive prior and written consent from all clients involved before he can continue the joint representation. Only the French regulation explicitly prescribes that the lawyer should withdraw as soon as a conflict of interests arises. The rationale behind these regulations is best explained in the commentary to the Dutch and English (solicitors) regulations, which state that under specific circumstances the common interests of the clients may outweigh their (potentially) conflicting interests. It is the lawyer's duty to balance all the interests involved and to inform all clients accordingly.

3.1.3.2 Concluding Remarks

From the foregoing it follows that all general codes of conduct refer to the duty of lawyers to prevent conflicts of interests. This duty is often linked to the lawyer's duty of confidentiality and legal professional privilege, his duty to maintain his independence also in relation to his client or clients, and his duty to act in the best interests of each individual client. This general principle, however, does not mean that it is at all times prohibited to represent more than one client in the same case. Indeed these clients might not have conflicting interests and even if they do, some codes of conduct allow lawyers to still represent those clients, although this representation is subject to limitations in order to safeguard the aforementioned principles.

In 6 Member States specific regulations concerning the defence of co-accused in criminal proceedings were identified in the general codes of conduct, namely in Croatia, Ireland (barristers), Italy, Poland, Scotland, and Sweden. The Croatian, Irish and Swedish regulations allow representation of co-accused in the same case, unless there is a (potential) conflict of

interests. The Scottish regulations are a little stricter: defence of co-accused is only allowed in very exceptional circumstances, irrespective of any conflicting interests. The regulations, however, do not specify 'exceptional circumstances'. The Italian and Polish regulations are most strict: defence of co-accused in the same proceedings is prohibited, irrespective of the existence of (potentially) conflicting interests.

In addition to the general principles mentioned above, 19 Member States provide detailed regulations on how the lawyer is to conduct himself when confronted with a request to represent more than one client in the same case. In 13 Member States representation of clients in the same matter is prohibited if the interests of these clients are (potentially) conflicting, namely Bulgaria, Cyprus, Czech Republic, Denmark, Ireland (solicitors), Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, and Spain. Prohibition of defending co-accused might be caused by the idea that the suspects will be able to coordinate their defence, which might have negative repercussions for the criminal investigation. This is particularly true in inquisitorially-based criminal justice systems, in which criminal investigations are often highly dependent on statements provided by the accused. This is why the police are often reluctant to allow the lawyer access to all suspects in the same case. It is also important to note in this regard that lawyers often decide beforehand not to visit all suspects in the same case because if they discover (potentially) conflicting interests, they may have to withdraw from all cases, which causes significant financial loss. So also can own financial interests play a role when deciding whether to start a joint defence.[508] In 6 Member States, namely Belgium, Finland, Estonia, France, the Netherlands, and England and Wales, joint defence of co-accused is not prohibited. However, the lawyer has a greater responsibility to inform all clients involved about the risks and consequences of the joint representation and all clients have to provide prior and written consent to the joint representation.

3.1.4 Providing Publicly Funded Legal Assistance (Legal Aid)

Article 6 § 3 (c) ECHR provides that legal assistance has to be available to suspects and accused persons free of charge if the circumstances so require. The availability of legal aid is an important procedural safeguard, in particular for indigent suspects and accused persons. The EU Directive on Legal Aid[509] prescribes that States should ensure an effective legal aid system, including legal aid services of adequate quality.[510] This requires appropriate training

[508] See Prakken & Spronken 2009, pp. 92 – 95.
[509] EU Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (Directive 2016/1919/EU (OJ L(2016) 297/1)).
[510] See Chapter 2, para. 2.1.4 for an elaborate overview of relevant European case law and regulations.

of lawyers providing legal aid[511] and sufficient monitoring mechanisms to guarantee continuous quality of legal aid providers. Research[512] has shown that the majority of Member States have monitoring mechanisms in place. The quality of lawyers providing legal aid is monitored by the Bar, the Government, the legal aid board or the judiciary, or a combination of the aforementioned.[513] The research does not further elaborate on how quality is monitored in the Member States. In this paragraph the monitoring mechanisms used in England and Wales and the Netherlands serve as an example of how quality of legal aid services can be monitored. Before going into the details of those mechanisms, relevant regulations concerning legal aid as they were identified in the general codes of conduct of the Member States are first mapped out. No specific regulations for criminal defence lawyers were found in the general codes of conduct, so that only the relevant general regulations can be discussed here.

3.1.4.1 Relevant General Rules of Conduct regarding Provision of Publicly Funded Legal Assistance

In the general codes of conduct of Belgium,[514] Bulgaria,[515] Cyprus,[516] Denmark,[517] Estonia,[518] Germany,[519] Ireland (solicitors),[520] the Netherlands,[521] Slovenia,[522] and Sweden,[523] regulations were identified concerning the provision of publicly funded legal assistance (legal aid). All these regulations in general refer to the lawyer's duty to inform the client of the possibility of legal aid, at least if it is clear to the lawyer that the circumstances are such that the client might be eligible for legal aid. Some of the regulations identified are more detailed. The Estonian, Swedish and Dutch regulations explicitly prescribe that the lawyer who has accepted to provide legal assistance on the basis of legal aid is not allowed to accept additional fees or compensation from the client or any other party. Moreover, the Dutch regulations explain that the client is not obliged to apply for legal aid, even if he were qualified to receive legal aid. Sometimes clients wish to pay for their own lawyer and in those

[511] Directive 2016/1919/EU, Art. 7.
[512] Spronken et al. 2009.
[513] Spronken et al. 2009, p. 81.
[514] Code de déontologie de l'avocat 2013, Art. 5.10; Codex deontologie voor advocaten 2018, Art. 265.
[515] Attorneys-at-Law Ethics Code 2005, Art. 18 § 2.
[516] Advocates' Code of Conduct Regulations 2002, Art. 29 § 2.
[517] Code of Conduct for the Danish Bar and Law Society 2011, Art. 13.2.
[518] Code of Conduct of the Estonian Bar Association 1999, Art. 17 §§ 4 and 5.
[519] Rules of Professional Practice 2018, Arts. 16 and 16a.
[520] A Guide to Good Professional Conduct for Solicitors 2013, Art. 3.7.2.
[521] Rules of Conduct 2018, Art. 18.
[522] Code of Professional Conduct of the Bar Association of Slovenia 2001, Art. 38.
[523] Code of Professional Conduct for Members of the Swedish Bar Association 2008, Art. 4.4.2.

cases the lawyer will have to put their agreement on payment in writing. Lastly, the Dutch regulations emphasise that lawyers have an independent responsibility to investigate whether their client is eligible for legal aid and if so, should inform their client accordingly. This responsibility to investigate does not only exist at the start of the lawyer-client relationship, but continues during the entire period of representation.
Unlike the Estonian, Swedish and Dutch regulations, the German regulations allow lawyers to accept separate fees from clients or third parties in addition to the fees received on the basis of legal aid. These additional fees can only be accepted, however, if these fees are paid voluntarily and the clients and third parties should always be well informed that they are not obliged to pay an additional fee if legal aid is already granted. Moreover, the German lawyer is allowed to terminate or refuse representation based on legal aid if there is an important reason, such as the lawyer's illness or excessive workload or a client who refuses to cooperate or if the mutual trust between the lawyer and the client has been compromised due to the client's character or conduct. According to German regulations, the lawyer is also not obliged to apply for legal aid.

Lastly, the regulations as identified in the Croatian general code of conduct are worth mentioning separately.[524] Although no explicit regulations were identified, the general code of conduct contained very elaborate regulations regarding fees for legal representation. These regulations describe a system which is completely based on a fixed fee schedule. Whenever a client voluntarily offers to pay a higher fee than the one established in the fee schedule, the lawyer is allowed to accept this higher fee. However, the lawyer has a duty to check whether the proposed fee is not disproportionate. In principle, it is prohibited to give a discount on a fee, although exceptions can be made for clients whose financial conditions are difficult. Such exceptions would allow the lawyer to also provide legal assistance to indigent suspects and accused persons.

3.1.4.2 Monitoring Mechanisms and Quality Assurance of Legal Aid Providers in England and Wales and the Netherlands

The general regulations as identified above do not include any monitoring mechanisms to guarantee sufficient quality of legal aid providers. To examine how such monitoring mechanisms could be designed, the mechanisms used for monitoring the quality of legal aid services as identified in England and Wales and the Netherlands are described here by way of illustration.

England and Wales use quality marks (such as the general Lexcel quality mark) and criminal litigation accreditation schemes to ensure the quality of legal aid providers of

[524] Attorneys' Code of Ethics 1999, Art. 139-149.

criminal work. The Law Society uses Lexcel[525] as a general legal practice quality mark. Practices and sole lawyers who are accredited or re-accredited against the Lexcel Standard are able to show that they excel in legal practice management and client care. Accreditation against Lexcel requires applicants to complete a self-assessment to identify any areas which need attention before the actual assessment takes place. This assessment is executed by an independent assessment body approved by the Law Society and involves a visit to the applicant's firm to determine whether the Lexcel Standard is met.

In addition to the Lexcel quality mark, which assesses practice management and client care in general, the Law Society provides separate accreditation schemes for each area of law. The Criminal Litigation Accreditation Scheme (CLAS)[526] is open to barristers, solicitors and legal executives who wish to carry out criminal law work and enables them to be included on the duty rosters of solicitors. Applicants can only be accredited against CLAS if they have obtained the Police Station Qualification or Police Station Representative scheme and the Magistrates' Court Qualification within three years prior to the application for accreditation.[527] A barrister or solicitor who is accredited against CLAS is considered to have a "high level of knowledge, skills, experience and practice in the area of criminal litigation".[528] Accreditation is executed by independent assessment organisations on the basis of portfolios submitted by the applicant and through role plays. These portfolios consist of detailed reports of cases in which the applicant himself has advised the client at the police station and during police interviews, and detailed and summarised reports of cases in which the applicant has provided representation.[529]

Lastly, the Legal Aid Agency randomly organises audits and official investigations.[530] During such audits and official investigation, the legal aid provider must be able to show records of all contract work. Such records:

> "[…] must be maintained in an orderly manner, showing all correspondence, attendance notes and disbursements on the relevant Matter or case, what Contract

[525] See: http://www.lawsociety.org.uk/support-services/accreditation/lexcel/
[526] See: http://www.lawsociety.org.uk/support-services/accreditation/criminal-litigation/
[527] Law Society, *Criminal Litigation Accreditation – Application form guidance notes and policies*, January 2019, p. 3 (http://www.lawsociety.org.uk/support-services/accreditation/documents/criminal-litigation-scheme-guidance/).
[528] See: http://www.lawsociety.org.uk/support-services/accreditation/criminal-litigation/
[529] Law Society, *Criminal Litigation Accreditation Scheme – Guidance on Police Station Qualification and Magistrates Court Qualification*, November 2011 (http://www.lawsociety.org.uk/support-services/accreditation/documents/criminal-litigation-PSQ-MCQ-guidance/).
[530] Legal Aid Agency, *2017 Standard Crime Contract – Standard Terms*, May 2018, s. 9.2 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819173/Standard_terms_-_version_2_current_version__effective_from_25_May_2018_.pdf). The years' term of the 2017 Standard Crime Contract expires on 31 March 2020. It has, however, been extended to 31 March 2021.

> Work was performed, when it was performed and by whom, how it was performed and how long it took."[531]

This might raise questions about the legal aid provider's duty of confidentiality. According to the terms of the Standard Crime Contract, any information provided to the Legal Aid Agency by the legal aid provider is not considered confidential, unless the legal aid provider explicitly identifies certain information as confidential and notifies the Legal Aid Agency accordingly.[532] It is important to note that certain information is always considered not confidential, such as information which has already come to the other party's knowledge, information which has already reached the public domain, and information about the lawyer's performance as a legal aid provider.

The monitoring mechanisms in the Netherlands are organised differently. The first monitoring mechanism concerns the registration requirements for lawyers who wish to provide legal aid in criminal cases. The right to legal aid is laid down in Article 18 §2 of the Dutch Constitution and further regulated by the Law on Legal Aid 1994 (*Wet op de rechtsbijstand 1994*).[533] Only lawyers who are registered with the Legal Aid Board are allowed to provide assistance on the basis of legal aid.[534] Registration is dependent on several criteria of admission,[535] which are further developed in separate regulations issued by the Legal Aid Board.[536] According to these regulations, separate registration requirements apply to lawyers who wish to provide legal aid in criminal cases. First, these lawyers must: have completed specific education in criminal law; have conducted at least five criminal cases; and in order to maintain their registration as a criminal defence lawyer with the Legal Aid Board, complete at least 15 criminal cases each year, complete at least 12 hours of continuous professional development training in the field of criminal law and complete a course on current affairs in the field of criminal law once every two years. If a criminal defence lawyer wishes to participate in the duty roster scheme, he will have to comply with additional requirements relating to training and practical experience in providing legal assistance in the pre-trial phase.[537]

---

[531] Legal Aid Agency, *2017 Standard Crime Contract – Standard Terms*, May 2018, s. 8.1.
[532] Legal Aid Agency, *2017 Standard Crime Contract – Standard Terms*, May 2018, s. 15.1.
[533] For an (elaborate) overview of the development of social advocacy and legal aid see for example: Westerveld 2008; Bauw et al. 2016 (Chapter 6). See Wolfsen 2015 and Goriely 1992 for a concise overview in English.
[534] Law on Legal Aid 1994 (*Stb.* 1993, 775), Art. 14.
[535] Law on Legal Aid 1994, Art. 15. In exceptional circumstances, for example when the suspect or accused person expressly wishes to be represented by an unregistered lawyer who has specific expertise in an area of law, it is possible for unregistered lawyers to provide legal assistance on the basis of legal aid (Art. 16).
[536] Registration Requirements for the Legal Profession 2018 (*Stc.* 2018, 9461).
[537] Registration Requirements for the Legal Profession 2018, Art. 6a.

Second, according to Article 26 of the Act on Lawyers (yet to be implemented) the National Bar Association will be responsible for the execution of quality tests for lawyers. The duty of confidentiality will not apply in order to ensure that those tests can be carried properly.[538] Although the new Article 26 has not yet entered into force,[539] new regulations on quality tests have already been adopted by the Bar.[540] These quality tests include structured discussions between peers, which are supervised by appointed experts (*intervisie*), and peer review (reviewers are also appointed experts).[541] Eight and four hours each year have to be spent by the lawyer on one of these forms of quality tests respectively. By participating in these quality tests, the lawyer will earn continuous professional development credits. It should be mentioned that as long as the new Article 26 of the Act on Lawyers has not entered into force, participation in these quality tests is not obligatory.

Lastly, the Legal Aid Board organises non-committal meetings for lawyers who practise in a certain area of law (mainly immigration law) to discuss and exchange practical experiences in order to promote the quality of legal aid. Lawyers who have indicated that they wish to participate in this programme will get a visit from specifically-trained lawyers once every three years to discuss selected case files regarding communication with the client, aspects of procedure, and legal quality.[542]

3.1.4.3 Concluding Remarks

In the general codes of conduct of at least 10 Member States, namely Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Ireland (solicitors), the Netherlands, Slovenia, and Sweden, relevant regulations were identified concerning the provision of legal aid. These regulations mainly concerned the lawyer's duty to inform the suspect and accused person of the availability of legal aid. Additionally, four Member States, namely Estonia, Germany, the Netherlands and Sweden, provided more detailed regulations. These regulations dealt with the question whether a lawyer is allowed to accept additional fees from clients or thirds parties if legal assistance is provided on the basis of legal aid. Only according to the German regulations is this allowed.

[538] Act on Lawyers, Art. 26 §2 (new).
[539] The bill to amend Article 26 of the Act on Lawyers has been up for consultation in January 2019 and December 2019 it has been put on the agenda for deliberation in the House of Representatives.
[540] The new quality tests can only be implemented, after the entry into force of the new Article 26 of the Act on Lawyers. Regulation of amendment of quality tests 2017, available at: https://www.advocatenorde.nl/dossier/kwaliteit/kwaliteitstoetsen
[541] Regulation of amendment of quality tests 2017, Art. 4.3a.
[542] For more information on this quality monitoring mechanism see: https://www.rvr.org/Informatie-over-de-raad/Collegiale+kwaliteitsbevordering

Additionally, England and Wales and the Netherlands were presented as examples of how monitoring mechanisms could be designed. Indeed, good quality of legal aid providers contributes to the effectiveness of legal assistance provided on the basis of legal aid. This showed that the mechanisms used in England and Wales are more detailed, more demanding and less non-committal for criminal defence lawyers than the mechanisms used in the Netherlands. At the same time, the EU Directive on legal aid mainly requires appropriate training of lawyers providing legal aid in criminal proceedings. The English and Dutch illustrations show that both States have different, yet appropriate accreditation and training schemes in place to ensure sufficient quality of criminal defence lawyers providing legal aid.

3.2 The Criminal Defence Lawyer as Strategic Adviser

Disclosure of information about the prosecution's case against the accused contributes to the fairness of proceedings and balancing of inequality,[543] and as such it is vital for a proper preparation of the defence. Without prosecution disclosure it will, for example, be rather difficult if not impossible for the criminal defence lawyer to advise the suspect on whether or not to invoke his right to silence or if he should enter a plea bargain or accept an out-of-court settlement. Given the vital importance of the accused's right to information, EU Directive 2012/13 urges Member States to properly train judges, prosecutors, police and judicial staff involved in criminal proceedings, to ensure that the suspect's right to information is effectively guaranteed.[544] The EU Directive is, however, silent on the role defence lawyers can play when securing the suspect's right to information.

After a careful examination of the general codes of conduct in all EU Member States, it can be concluded that none of these general codes contain provisions regarding access to case material in the course of proceedings. This could be explained by the fact that the right to information is not so much a general deontological issue, but a criminal procedural issue and it will therefore most probably be regulated by criminal procedural regulations instead of in a general code of conduct for lawyers.[545]

In this paragraph the deontological regulations concerning the criminal defence lawyer's role as strategic adviser that were identified in general codes of conduct for lawyers in the Member States are discussed. The aspects of this role which are discussed in this paragraph

[543] Owusu-Bempah 2013, p. 184; Directive 2012/13/EU, OJ 2012, L 142/1, recital 27 and Article 7; see further para 2.2.3. of Chapter 2.
[544] Directive 2012/13/EU, OJ 2012, L 142/1, recital 37 and Art. 9.
[545] It should be noted here that the Dutch Statute for Criminal Defence Lawyers is actually the only set of deontological regulations referring to this right of information. This can be explained by the fact that this Statute is the only set of regulations which formulates rules of conduct, as well as guarantees and privileges which criminal defence lawyers need to provide an effective criminal defence (see para. 2.3.2 of this Chapter).

concern advising on silence and settling the case (out of court), conducting an investigation for the defence, the assistance of an interpreter during lawyer-client communications and the lawyer's duty to keep his client informed about the course of proceedings.

3.2.1 Advising on the Right to Silence

The privilege against self-incrimination and the right to remain silent protect the suspect or accused person against improper compulsion by the authorities, contribute to the avoidance of miscarriages of justice and fulfil the aims of Article 6 ECHR.[546] The right to remain silent is not explicitly provided for in Article 6 ECHR, but according to standing ECtHR case law the right to silence and privilege against self-incrimination are fundamental features of the concept of a fair trial, since they are considered "generally recognised international standards which lie at the heart of the notion of a fair procedure".[547] As such, these standards protect the suspect against "improper compulsion by the authorities" and contribute to "avoiding miscarriages of justice and to securing the aims of Article 6".[548] The criminal defence lawyer has an important role in safeguarding this right to silence and the privilege against self-incrimination, particularly when assisting the suspect during police interrogation.[549]

It is the criminal defence lawyer's task to advise the suspect whether or not to invoke his right to silence during interrogation. In order to provide proper advice, the lawyer will need sufficient information about the prosecution's case against the suspect. This requires a certain level of disclosure from the side of the police and the prosecution, which is often not or not yet available at the earliest stages of criminal proceedings. Well-informed advice on silence is even more important since courts can draw adverse inferences from a suspect's silence pre-trial, particularly when there is a question about the case to be answered. Advising on the right to silence is therefore a vital yet delicate aspect of the criminal defence lawyer's role as strategic adviser. None of the general codes of conduct under review provides any regulations concerning advising on the right to silence, which is most probably due to the fact that it is a very specific aspect of criminal proceedings. Still, advising on the

[546] ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), §§ 54-55; see also Chapter 2, para. 2.2.6 for more an elaborate overview of relevant ECtHR case law.
[547] See for example: ECtHR 25 February 1993, ECLI:CE:ECHR:1993:0225JUD001082884 (*Funke/France*), §§ 41-44; ECtHR 17 (GC) December 1996, ECLI:CE:ECHR:1996:1217JUD001918791 (*Saunders/UK*), § 68; ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*), § 45; ECtHR 21 December 2000, ECLI:CE:ECHR:2000:1221JUD003472097 (*Heaney and McGuinness/Ireland*), § 40; ECtHR 22 July 2008, ECLI:CE:ECHR:2008:0722JUD001030103 (*Getiren/Turkey*), § 123.
[548] ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*), § 45.
[549] ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*), §§ 54-55; ECtHR 24 September 2009, ECLI:CE:ECHR:2009:0924JUD000702504 (*Pishchalnikov/Russia*), § 69.

right to silence confronts the lawyer with several challenges. Therefore, by way of illustration, the challenges faced by English criminal defence lawyers regarding advising suspects or accused persons on their right to silence are briefly described in the following paragraph.

3.2.1.1 Advising Suspects on their Right to Silence in England and Wales

Suspects who are arrested and brought to the police station for questioning have to be cautioned prior to interrogation that they are not obliged to answer questions and that the statements that they do make can be used in evidence.[550] At the same time, inferences can be drawn from a suspect's silence. These inferences may only be drawn when this is reasonable in the given circumstances, which is particularly the case when the prosecution has a strong case. Although silence in itself is insufficient to prove guilt, conclusions drawn from the accused's silence may be used in evidence, particularly when there is a lacuna in evidence which would normally be solved by a statement from the accused. When the accused remains silent on this issue, the court may draw the conclusion that apparently there is no other explanation than the one provided by the evidence before it.[551]

In England and Wales the drawing of inferences from silence is regulated by the Criminal Justice and Public Order Act 1994 (CJPOA 1994).[552] In short,[553] inferences can be drawn when an accused relies on facts at trial that have not been mentioned at an earlier stage of proceedings (for instance, during interrogation or charge); or if he fails or refuses to give account for any object, substance or mark on his person, clothing or footwear; or for his presence at a particular place. Such inferences cannot be drawn if the accused was in custody at the time of failure or refusal without having had an opportunity to consult a solicitor prior to their failure or refusal to answer any questions.[554]

Against the background of the foregoing, it should be noted that legal advice to invoke silence does not automatically protect the suspect from adverse inferences being drawn.[555] Particularly in England and Wales where the criminal defence lawyer not only has to uphold a duty towards the client but also towards the court, the criminal defence lawyer may be facing a deontological dilemma, which is best summed up by LCJ Woolf (then Lord Chief Justice) in *R v. Beckles*:

---

[550] Code of Practice C (2019), § 10.5.
[551] Dreissen 2007, p. 204; Cape 2006-III, p. 4; ECtHR 8 February 1996, *John Murray v. UK*, no. 18731/91.
[552] CJPOA 1994, ss. 34-38.
[553] For a more detailed account see for example Cape 2006-III and Blackstock et al. 2014, p. 79, including references.
[554] Code of Practice C (2019), Annex C.
[555] Quirk 2013-I, pp. 472-473 including references; ECtHR 2 May 2000, ECLI:CE:ECHR:2000:0502JUD003571897 (*Condron/UK*), §§ 61-62; *R v. Good (Alfie)* [2016] EWCA Crim 1054.

> "Where the reason put forward by a defendant for not answering questions is that he is acting on legal advice, the position is singularly delicate. On the one hand the Courts have not unreasonably wanted to avoid defendants driving a coach and horses through section 34 [CJPOA 1994, *MEA*] and by so doing defeating the statutory objective. Such an explanation is very easy for a defendant to advance and difficult to investigate because of legal professional privilege. On the other hand, it is of the greatest importance that defendants would be able to be advised by their lawyer without their having to reveal the terms of that advice if they act in accordance with that advice."[556]

According to standing case law,[557] reliance on legal advice may protect the accused against inferences only if this advice was based on 'soundly based objective' or 'good' reasons. This includes, for instance, little or no prosecution disclosure, complexity of the case or an accused's inability to respond to questions due to ill-health or intoxication. The court will thus evaluate the rationale of the legal advice to invoke silence, which is only fully possible if the lawyer discloses certain, mostly confidential, information. In order to be able to disclose this information, the lawyer needs his client's permission.[558] Still, the authorities should respect legal privilege and when the lawyer and accused explain that reasons for the legal advice are covered by legal privilege and can therefore not be shared with the authorities, the latter should accept such a claim and inferences should not be drawn.[559]

Furthermore, the criminal defence lawyer will have to be aware of practical and possibly negative consequences of the advice he provides to the suspect regarding the latter's right to silence. For example, remaining silent during interrogation might cause the suspect to have to stay in pre-trial detention for a longer period of time and, in practice, it is notoriously difficult for suspects to actually remain silent in a police interrogation. Moreover, suspects should be made aware of the fact that also statements made on a less official basis than the police interrogation could be recorded and used in evidence. This includes conversations with other detainees.[560]

---

[556] *R v. Beckles* [2004] EWCA Crim 2766, § 43.
[557] See for example: *R v. Howell* [2003] EWCA Crim 01; *R v. Hoare and Pierce* [2004] EWCA Crim 784 and *R v. Beckles* [2004] EWCA Crim 2766.
[558] Quirk 2013-I, p. 475; Cape 2006-III, p. 12.
[559] Law Society's Practice Note "Legal professional privilege", 13 November 2019, § 2.5: "Investigators or regulators should not draw any adverse inferences from a claim to privilege or a refusal to waive it." And § 10.1: "Given that LPP (legal professional privilege) is sacrosanct, and the law is clear that adverse inferences cannot be drawn from a client's refusal to waive LPP, we consider that no regulator or investigator is entitled to pressure a client to waive LPP."
[560] Prakken & Spronken 2009, pp. 292-293.

3.2.1.2 Concluding Remarks

Advising the suspect or accused person on his right to silence is a delicate issue, which is primarily caused by the lack of prosecution disclosure at the earliest stages of criminal proceedings and the fact that adverse inferences can be drawn from a suspect's silence during pre-trial investigations. In the general codes of conduct, no specific regulations on advising on silence could be found, which is quite logically explained by the fact that advising a client on his right to silence is only relevant in criminal proceedings.

It has also been argued in this paragraph that deontological challenges are intertwined with the criminal justice system in which the criminal defence lawyer has to operate. This was illustrated with an example from England, in which it has become clear that the criminal defence lawyer's specific duty to the court combined with the accused's autonomous position in the proceedings leads to the complicated situation in which the lawyer's advice is subject to judicial evaluation in order to determine whether adverse inferences can properly be drawn despite the fact that the accused person claims to only have followed legal advice to invoke silence. Indeed, the trial judge is essentially judging the quality of legal advice, which could have a chilling effect on the lawyer's performance in the pre-trial phase[561] and be detrimental to an effective defence.

3.2.2 Advising on Settling the Case

When each criminal offence would have to be dealt with by a judge (and/or jury), any criminal justice system would soon be completely overloaded and not be able to function properly. Therefore, each criminal justice system has incorporated certain forms of settlement procedures to handle criminal cases without or with only minimal involvement of the courts. The most known form of out-of-court settlement is the "plea bargain", which can be defined as:

> "[…] the practice whereby the accused enters a plea of guilty in return for which he will be given some consideration that results in a sentence concession."[562]

A distinction can be made in "charge bargaining", when the accused pleads guilty to a lesser charge and therefore receives a lesser sentence, and "sentence bargaining", when the accused pleads guilty to the charges and receives a reduction in sentence (the earlier the plea, the more significant the reduction).[563] The initiative for the plea bargain lies with the

[561] See also Quirk 2013-I, p. 475; para. 2.9 of this Chapter.
[562] Slapper and Kelly 2006, p. 557.
[563] Brants & Stapert 2014, p. 73.

accused and concerns the facts, the charge or the sentence, and is often a combination of these possibilities.[564] It is typically an accusatorial feature of criminal proceedings because when a plea bargain is accepted, the material facts of the case will no longer be relevant.[565] The plea can be considered a fictional, judicial truth used as the starting point for the sentencing hearing. It is in fact a perfect example of the autonomous position of the accused in accusatorial proceedings and shows how the parties to proceedings determine the actual scope of the case.[566]

In its landmark decision *Natsvlishvili and Togonidze,* the ECtHR ruled that the concept of plea bargain as a form of out-of-court settlement is only compatible with the right to a fair trial if acceptance of the plea bargain by the accused was based on a voluntary and fully informed decision regarding the legal consequences of this plea bargain. Moreover, there must have been "sufficient judicial review of the content of the plea bargain and of the fairness of the manner in which it has been reached".[567] This ECtHR judgment also included a short comparative study, which showed that plea bargaining is common across Europe, also in Member States that are not based on an accusatorial tradition.[568] The following information is based on this study.

Although typically it is considered to be an accusatorial feature of criminal proceedings,[569] most legal systems across the EU are familiar with the concept of plea bargaining,[570] particularly sentence bargaining. Usually these plea bargains result in a criminal conviction, although there are also criminal justice systems, such as Austria, Belgium, and France in which criminal proceedings are discontinued after a plea agreement. Austria, Denmark and Portugal have no legislation on plea bargaining, but are familiar with plea bargaining or similar proceedings. In most EU Member States, except Bulgaria, Germany, Romania, and the United Kingdom, the prosecution and accused determine the terms of the plea agreement and the courts only review the agreements. In Bulgaria, courts are allowed to propose amendments, but the plea agreement can only be modified accordingly with the approval of the prosecution and the defence. In Germany, Romania and to some extent in the United Kingdom the courts define the terms of the agreement. Legal representation of the accused when entering plea agreements is obligatory in Bulgaria, Czech Republic, France,

564 Brants & Stapert 2004, p. 73.
565 Cape et al. 2010, p. 113.
566 Brants & Stapert 2004, p. 98; Langbein 2003, p. 331 et seq.
567 ECtHR 29 April 2004, ECLI:CE:ECHR:2014:0429JUD000904305 (*Natsvlishvili and Togonidze/Georgia*), § 92.
568 ECtHR 29 April 2004, ECLI:CE:ECHR:2014:0429JUD000904305 (*Natsvlishvili and Togonidze/Georgia*), §§ 62-75.
569 Cape et al. 2010, p. 113. Plea bargaining is a perfect example of the autonomous position of the accused in accusatorial proceedings and shows how the parties to proceedings have the power to determine the actual scope of the case. See also Brants & Stapert 2004, p. 98; Langbein 2003, pp. 331 et seq.
570 The ECtHR in *Natsvlishvili and Togonidze* mentions Austria, Belgium, Bulgaria, Czech Republic, Estonia, France, Germany, Hungary, Italy, Malta, Poland, Romania, Slovakia, Slovenia, Spain, and the United Kingdom.

Hungary, Malta, and Slovenia. In almost all Member States that allow plea bargaining, plea agreements can only be entered if the accused confesses guilt; Italy being the only exception. In all Member States, except Romania, the accused's plea of guilty can only be used for the purpose of reaching the plea agreement. When a plea agreement is not reached, the plea of guilty cannot be used against the accused in evidence.

Courts decide on plea agreements in Austria, Bulgaria, Czech Republic, Estonia, France, Germany, Hungary, Italy, Malta, Romania, Slovakia, Spain, and the United Kingdom. Bulgarian, Hungarian, Romanian, and Slovak laws explicitly require an accused to be present at the hearing, while his presence is not necessarily required in Italy. The court verifies whether the accused has entered into the agreement voluntarily and knowingly, whether there is evidence to support the plea of guilty and whether the terms of the agreement are appropriate. This means that the court has to profoundly review the agreement before deciding whether it approves or rejects the plea agreement. Only in Italy is the court not obliged to examine the evidence that supports the agreement. Conversely, Germany and the United Kingdom take the review of the evidence a step further when the courts can also request additional information if the evidence supporting the agreement is insufficient to come to a decision.

In Bulgaria, Czech Republic, Estonia, Hungary, Italy, Malta, Slovakia, and Spain, accused persons waive their right of appeal to some extent by entering into a plea agreement. The exact extent of the waiver is, however, unclear. In Slovenia there seems to be complete waiver of the right of appeal, while in Austria, France, Germany, Poland, Romania, and the United Kingdom the right of appeal remains unaffected after entering into a plea agreement.

It is clear that entering into a plea agreement benefits the accused persons, because he usually has to serve a lesser sentence as a result of this agreement. The practice of plea bargaining, however, also has its downside. First of all, the fact that the accused may receive a (serious) sentence reduction in exchange for a plea of guilty might cause severe external pressure for the accused to plead guilty as early as possible. For example, in some cases even if pleading guilty were not to his advantage because the prosecution's case is not as strong as anticipated and thus acquittal could also be a real possibility. Furthermore, it causes the presumption of innocence to become obsolete.[571] In fact, accused are presumed guilty based on their plea, without the need for any evidence to support this presumption. Against the backdrop of the external pressure to plead guilty as early as possible and the practice of about 90% of accused pleading guilty as charged to support the reality of this pressure, the erosion of the presumption of innocence is alarming. Additionally, this leads to little incentive for the prosecution to thoroughly prepare charges because they do not have to prove anything, since most charges will lead to a plea of guilty anyway.[572] Therefore, the ECtHR

[571] See for example Bridges 2006.
[572] See also Alge 2013, p. 164.

ruled in *Natsvlishvili and Togonidze* that plea bargaining is only compatible with Article 6 ECHR under strict conditions.[573] In order to safeguard the accused's procedural rights, it is important that criminal defence lawyers carefully advise accused on this matter.

The general codes of conduct for lawyers in Estonia, Ireland, Lithuania, England and Wales, and Scotland provide regulations regarding the advice on pleading in criminal cases. According to the Estonian Code of Conduct, the lawyer is only bound by a suspect's plea of not guilty:

> "If the client denies the accusations made against him the position of the client shall be binding upon the advocate. The advocate shall not be bound by the position of his client when rendering a legal opinion on the accusation made against his client, however, he shall inform the client about the defence position." [574]

According to this provision, the lawyer can decide on the rest of the defence strategy without being obliged to confer with his client, although he should always inform his client about the chosen strategy. This provision also seems to imply that the lawyer is not bound to the accused's plea of guilty. This could in practice lead to the situation that the lawyer conducts a defence based on the accused's innocence, irrespective of the accused's position, because the lawyer believes that the accused acts wrongly in admitting guilt. It should be noted though, that the wording of the Estonian provision on guilty pleading leaves certain room for interpretation.

The Lithuanian Code of Conduct on the other hand provides an elaborate and detailed regulation regarding the defence lawyer's position on plea bargaining:

> "6.9 Although an independent participant of the proceedings in criminal cases an advocate may not select any position of defense without a client's awareness. An advocate shall consult a client and take due regard of his reasoning and arguments.
> 6.10 Provided a client pleads guilty an advocate shall, after having evaluated all evidence in a case and having made the same conclusion, analyse all factors mitigating a client's liability in his statement of defence.
> 6.11 When a client pleads guilty, an advocate shall, after having evaluated all evidence in a case and having made the conclusion a client's guilt is not proven or is in question, maintain an independent position, irrespective of a client.
> 6.12 When a client pleads not guilty, an advocate shall not, upon getting conversant with a case and reasonable considering there to be sufficient evidences to justify the guilt of a client, persuade him to plead guilty as guilt or innocence lies within the

[573] ECtHR 29 April 2004, ECLI:CE:ECHR:2014:0429JUD000904305 (*Natsvlishvili and Togonidze/Georgia*), § 91.
[574] Code of Conduct of the Estonian Bar Association 1999, Art. 19 § 3.

> competence of the court only. An advocate shall be obliged to explain to a client, who disagrees with a position chosen by an advocate, the possibility to refuse an advocate's services.
> 6.13 Provided a client pleads guilty, an advocate shall, after having evaluated all evidence and reasonably considering that there are other, minor attributes of a criminal act in a client's actions should explain the situation to him. An advocate shall be obliged to explain to a client, who disagrees with an opinion, arguments and manner of defense of an advocate the possibility to refuse an advocate's services."[575]

According to this regulation, the Lithuanian criminal defence lawyer always has to remain critical towards his client's position. He should at all times evaluated all the evidence and draw his own, independent conclusions from this evidence. Based on his evaluation of the evidence, the lawyer will construct a defence strategy, which may not be in line with the defence position of the client's choice. A criminal defence lawyer is, however, never allowed to persuade the client to plead guilty, since the determination of guilt is the sole task of the court. The client is free to discontinue the relationship with the lawyer, In the event that the client and the criminal defence lawyer disagree about the defence strategy. It is the lawyer's duty to inform the client of this possibility.

The general codes of conduct for the legal profession in the United Kingdom (England and Wales, Ireland, and Scotland) contain elaborate provisions regarding the situation where the client has confessed guilt to the lawyer:

> "[…] For example, if your client were to tell you that they have committed the crime with which they were charged, in order to be able to ensure compliance with Rule rC4[576] on the one hand and Rule rC3[577] and Rule rC6[578] on the other:
> 1. you would not be entitled to disclose that information to the court without your client's consent; and
> 2. you would not be misleading the court if, after your client had entered a plea of 'not guilty', you were to test in cross-examination the reliability of the evidence of the prosecution witnesses and then address the jury to the effect

[575] Code of Professional Conduct for Advocates of Lithuania 2005, Arts. 6.9-6.13.
[576] "Your duty to act in the best interests of each client is subject to your duty to the court."
[577] "You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have […]."
[578] "Your duty not to mislead the court will include the following obligations: 1. you must not: (a) make submissions, representations or any other statement; or (b) ask questions which suggest facts to witnesses which you know, or are instructed, are untrue or misleading […]."

that the prosecution had not succeeded in making them sure of your client's guilt.

However, you would be misleading the court […] if you were to set up a positive case inconsistent with the confession […]" [579]

"10.11 Barristers to whom a confession of guilt is made by their client must observe the following rules:

a. If the confession is made before the proceedings have started, they may continue to act only if the accused pleads guilty or where the accused pleads not guilty then they may continue to act subject to the limitations referred to in the following sub-paragraphs.
b. If the accused is not pleading guilty the Barrister must explain to the accused that the conduct of their defence will be limited in the manner as set out in sub-paragraph below.
c. Barristers must emphasise to the accused that no substantive defence involving an assertion or suggestion of innocence will be put forward on their behalf and that, if they are not satisfied with this approach to the conduct of the trial, then the accused should seek other advice. […]
d. If the confession is made during the proceedings or in such circumstances that a Barrister cannot withdraw without compromising the position of the accused the Barrister should continue to act but subject to the limitations on the conduct of the defence being that the Barrister may not set up an affirmative case inconsistent with the confession such as by asserting or suggesting that some other person committed the offence charged or by calling evidence in support of an alibi or by calling the accused to give evidence to deny the charges or support an alibi.

10.12 The accused should be explicitly advised that the decision on whether to enter a plea of guilty is exclusively a matter for him. So long as an accused maintains his or her innocence a Barrister's duty lies in advising the accused on the law appropriate to his or her case and the conduct thereof. Barristers shall not put pressure on the accused to tender a plea of guilty whether to a restricted charge or not. However, it is not improper clearly to advise an accused as to the strength of a prosecution case and likely outcome where appropriate. Where an accused wishes to enter a plea of guilty a Barrister should ensure that the accused is fully aware of all of the consequences of such a plea and they should advise that the instructions to plead guilty are recorded by their instructing solicitor in writing and in the presence of the accused. Where an accused tells a Barrister that he did not commit

[579] The BSB Handbook Version 4.3 (2019), gC9.

the offence with which he is charged but nonetheless wishes to plead guilty it is not improper to continue to act. The consequences of such a course should be explained and it should be further explained that what can be submitted in mitigation can only be on the basis that he is guilty if such a plea is entered. […]"[580]

"[…] Whilst a defence advocate should present every technical defence which is available to the defendant he should never present a defence other than one based upon the facts. […] In criminal matters it is a matter for the jury or the court, not for the advocate for the defence, to decide the guilt or innocence of his client. It is the duty of the solicitor for the defence to put the prosecution to proof of what it alleges and the solicitor may submit to the court that there is insufficient evidence adduced to justify a conviction. Where, prior to the commencement or during the course of any criminal case, a client admits to his solicitor that he is guilty of the charge, it is well settled that the solicitor need only decline to act in such proceedings if the client is insistent on giving evidence to deny such guilt or requires the making of a statement asserting his innocence. Where the client has admitted his guilt to his solicitor but will not be giving evidence, his solicitor may continue to act for him. The solicitor for the defence may also advance any other defence which obliges the prosecution to prove guilt other than protesting the client's innocence."[581]

"Where an accused person makes a confession to you and you are satisfied in law that such confession amounts to guilt, you must explain to the accused (if he is not pleading guilty) that the conduct of his defence will be limited by that confession. It must be emphasised to the accused that no substantive defence involving an assertion or a suggestion of innocence will be put forward on his behalf and that, if he is not satisfied with this, he should seek other advice. You should consider whether it is advisable to obtain confirmation in writing from the accused that he has been so advised and that he accepts such an approach to the conduct of his defence.
So long as an accused maintains his innocence, your duty lies in advising him on the law appropriate to his case and the conduct thereof. You may not put pressure on him to tender a plea of guilty, whether to a restricted charge or not, so long as he maintains his innocence. Nor should you accept instructions to tender a plea in mitigation on a basis inconsistent with the plea of guilty. You should always consider very carefully whether it is proper, in the interests of justice, to accept instructions to tender a plea of guilty. You should ensure that the accused is fully aware of the

[580] Code of Conduct for the Bar of Ireland 2019, Arts. 10.11 and 10.12.
[581] A Guide to Good Professional Conduct for Solicitors 2013, Art. 5.6 (Ireland).

> consequences and should insist that the instructions to plead guilty are recorded in writing."[582]

In the legal systems of Ireland and England and Wales, which are of a common law tradition, confessions of guilt by the client restrict the lawyer in the legal representation of his client. According to the provisions cited above, criminal defence lawyers are not allowed to build or support a defence strategy asserting the client's innocence if a client confesses guilt, but pleads not guilty. The lawyer is, for example, not allowed to raise an alibi or suggest that another person is guilty of the crime with which his client is charged. In conclusion, it can be said that when the client confesses guilt to the criminal defence lawyer in the UK, the lawyer is allowed to test and challenge the prosecution's evidence and stress that the prosecution has not been able to prove beyond doubt that his client is guilty of the charges, with the limitation that he can never set up a defence asserting the client's innocence.

3.2.2.1 Concluding Remarks

It follows from this paragraph that although almost the majority of EU Member States, namely Bulgaria, Czech Republic, Estonia, France, Germany, Hungary, Italy, Malta, Poland, Romania, Slovakia, Slovenia, Spain, and the United Kingdom, provide for the possibility of plea bargaining in their criminal justice system, only few Member States also provide regulations in the general codes of conduct relating to advising on plea bargaining. The general codes of conduct of Estonia, Ireland, Lithuania, England and Wales, and Scotland provide relevant and specific regulations for criminal defence lawyers. These can be distinguished in the lawyer's position with regard to the client's plea of guilty or not guilty (Estonia and Lithuania) and the lawyer's limitations when the client has confessed guilt to the lawyer (England and Wales, Ireland, and Scotland).

The main difference between these regulations is that, while lawyers in England and Wales, Ireland and Scotland are bound by the client's plea of guilty (in which case they are not allowed to set up an active defence based on the suspect's innocence), lawyers in Estonia and Lithuania are only bound by the client's plea of not guilty. Even more so, if the suspect in Estonia or Lithuania wants to plead guilty and the lawyer is of the opinion that the suspect's guilt cannot be derived from the evidence in his case, the lawyer then has the authority to decide on the defence strategy independently from the client.

[582] The Law Society of Scotland Practice Rules 2011, Arts. 4.4.24 and 4.4.25.

3.2.3 Contacting Witnesses by the Defence

According to Article 6 § 3 (d) ECHR an accused person has the right to:

> "[…] examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

Thus it is clear that the accused has the right to call and examine witnesses or have witnesses examined. The ECHR, however, neither provides any right for the accused to examine *prospective* witnesses in order to determine whether it would be useful to call these witnesses on his behalf, nor creates possibilities for the accused to carry out an investigation to collect evidence (other than witness statements) to support his case. An explanation for this lacuna[583] could be that the differences between inquisitorial and adversarial judicial systems when it comes to the possibilities for the defence to carry out their own investigation make it very difficult to establish such rights in common.[584]

Before going into the details of the relevant rules of conduct regarding contacting witnesses, it is important to note that this overview and analysis is limited to the *general codes of conduct*. Yet, this subject of contacting witnesses would generally be regulated in *national codes of criminal procedure*. For example, although the German conduct of conduct does not contain any provisions regarding contacting witnesses pre-trial, the German code of criminal procedure allows criminal defence lawyers to contact witnesses for the defence and for the prosecution at all stages of the proceedings. Moreover, it is not uncommon for criminal defence lawyers in high-profile criminal cases to interview witnesses pre-trial.[585] Also in France, investigation by the defence is not prohibited by law, but in practice it is rarely conducted[586] and the French code of conduct does not provide any regulation on the lawyer's conduct towards witnesses.

In the general codes of conduct of Ireland, Italy, and the Netherlands, specific regulations were found governing the criminal defence lawyer's conduct when contacting witnesses in criminal proceedings. According to the Irish code of conduct for solicitors, the criminal defence solicitor:

> "[…] is entitled to interview a witness and to take statements from him in any civil or criminal proceedings, whether or not that witness has been interviewed or called

[583] Also Directive 2013/48/EU does not provide any regulations concerning the investigation by the defence.
[584] See also generally Cape et al. 2007, Spronken et al. 2009 and Cape et al. 2010.
[585] Cape et al. 2010, p. 295.
[586] Cape et al. 2010, p. 235.

> as a witness by the other party, provided there is no question of tampering with the evidence of a witness or suborning him to change his story.
> In the rare case where a solicitor for the defence interviews a witness for the other side, that solicitor may well be exposed to the suggestion that he has tampered with the evidence of such a witness. A court or jury would be more likely to conclude that the witness has been tampered with where such an interview has taken place and this might harm the case to be made by the solicitor's client. The fact that the witness has been interviewed may be seen to weaken the cross examination."[587]

Although the Irish code of conduct for solicitors does not prohibit contact with witnesses, it does discourage solicitors for the defence from contacting and interviewing witnesses for the prosecution prior to trial to avoid even the appearance of having influenced the witness.

The Italian code of conduct is quite explicit in prohibiting the lawyer from influencing witnesses when interviewing them. It provides in Article 55:

> "1. A lawyer, who speaks to witnesses or persons of interest involved in a judicial proceeding, shall avoid being too forceful or making direct suggestions in an effort to obtain favorable evidence.
> 2. A lawyer, within a criminal proceeding, retains the right to carry out investigations in compliance with the terms and conditions of law and respecting the provisions hereinafter and those provided by the authority for the protection of personal data.
> […]
> 6. The information, which the defender and other parties that he possibly delegates are required to give by law to persons interviewed for the purposes of investigation, shall be documented in writing.
> 7. The defending counsel and the other parties he delegates are not allowed to pay compensation in whatever form to the persons they asked to assist with the investigation, with the exception of reimbursing them the expenses based on receipts.
> […]
> 11. The defending counsel is not obliged to give a copy or excerpt of the minutes neither to the person who provided the information nor to the defending counsel of such person.
> 12. The breach of prohibition under sub-section 1 entails the enforcement of suspension of the legal practice from two to six months as disciplinary sanction. The breach of duties, of prohibitions, of legal obligations and of prescriptions under sub-sections 3, 4 and 7 entails the enforcement of suspension of the legal practice from

[587] A Guide to Good Professional Conduct for Solicitors 2013, Art. 5.4.

> six months to one year as disciplinary sanction. The breach of duties, prohibitions, legal obligations and prescriptions under sub-sections 5, 6, 8, 9, 10 and 11 entails the enforcement of censure as disciplinary sanction."[588]

The Dutch code of conduct provides that the lawyer must be:

> "[..] careful in his contacts with witnesses and not perform any actions which could lead to unauthorized influencing of witnesses."[589]

In the guidance to this Dutch rule of conduct, it is mentioned that in the previous version of the rules criminal defence lawyers were prohibited from having any contact with witnesses for the prosecution.[590] In the latest version of the rules of conduct, this rule was abolished, because it was considered to be in violation of the principle of equality of arms. In this regard it becomes questionable whether the second paragraph of the relevant Irish provision as cited above is still sustainable in light of the principle of equality of arms.

3.2.3.1 Relevant General Rules of Conduct regarding Contacting Witnesses by the Defence

Besides the general rules of conduct as discussed in the previous paragraph, also relevant general rules of conduct were identified in the general codes of conduct of Austria,[591] Croatia,[592] Denmark,[593] Estonia,[594] Finland,[595] Ireland (barristers),[596] Malta,[597] Slovakia,[598] Sweden,[599] and England and Wales.[600]

These regulations allow the lawyer to have contact with witnesses at any given moment in the proceedings. Some regulations explicitly mention that lawyers are allowed to contact witnesses irrespective of whether they have already been interviewed by the opposing party (Finland and Sweden). It follows from other regulations that lawyers are allowed to contact

[588] Code of Conduct for Italian Lawyers 2014, Art. 55.
[589] Rules of Conduct 2018, Rule 22 § 1.
[590] Rules of Conduct 1992, Rule 16 § 2.
[591] Richtlinien für die Ausübung des Rechtsanwaltsberufes und für die Überwachung der Pflichten des Rechtsanwaltes und des Rechtsanwaltsanwärters 1977, Art. 1 § 8.
[592] Attorneys' Code of Ethics 1999, Art. 98.
[593] Code of Conduct for the Danish Bar and Law Society 2011, Art. 18 § 3.
[594] Code of Conduct of the Estonian Bar Association 1999, Art. 22 § 3.
[595] Code of Conduct for Lawyers 2009, Art. 8.4.
[596] Code of Conduct for the Bar of Ireland 2019, Art. 5.11.
[597] Code of Ethics and Conduct for Advocates (year unknown), Part 4-Chapter 1-rule 3.
[598] Rules of Professional Conduct for Lawyers 2004, Section 7.
[599] Code of Professional Conduct for Members of the Swedish Bar Association 2008, Art. 6.3.1.
[600] BSB Handbook Version 4.3 (2019), rC9 § 3 and 4; SRA Code of Conduct 2018, paragraph 2.2.

witnesses also prior to trial (Austria, Croatia and Denmark). Moreover, some regulations mention that lawyers may take oral or witness statements (Denmark and Slovakia), at the same time these provisions emphasise that the lawyer has to inform the witness that he is under no obligation to disclose any information to the lawyer nor is he obliged to sign the written statement.

All the provisions mentioned here emphasise that the lawyer is not allowed to influence the witness. This is also very explicitly worded in all provisions, expect in the Maltese regulation and Irish regulation for barristers. The Maltese regulation states that a lawyer is not permitted to interview a witness when this would compromise "the search for the truth" and the Irish regulation for barristers mentions that the barrister is not allowed to "coach a witness", which means that the barrister is not allowed to give the witness instructions on the evidence to be given.

In practice, the rule that lawyers should refrain from any conduct that might cause the impression of influencing the witness – a rule that is found also in the aforementioned regulations specifically allowing lawyers to have contact with witnesses – causes many lawyers to be very cautious when approaching witnesses, especially witnesses for the prosecution. Even more so, lawyers might refrain from contacting witnesses for the prosecution at all.[601]

This follows most clearly from the wording of the Irish Solicitors' code of conduct as cited above: "*in the rare case* where a solicitor for the defence interviews a witness for the other side" [emphasis added]. If an Irish solicitor for the defence decides to interview a witness who is to be called by the prosecution, he is advised to have a representative of the Garda Sióchana (Irish police force) present who is not involved in the case.[602] It is thus not prohibited for solicitors in Ireland to interview witnesses who are to be called by the prosecution, but solicitors are warned that the risks are quite significant and that they should do their utmost to avoid being accused of influencing the witness. The question has already been raised whether this is in line with the principle of equality of arms: should the defence not have the same powers with regard to investigation as the prosecution, especially in an adversarial legal system, such as Ireland's? And how does this guidance relate to the independence of the criminal defence lawyer?

Until now only general rules of conduct which allow lawyers to have contact with witnesses during (criminal) proceedings have been discussed. However, the general codes of conduct of Belgium (Wallonia)[603] and Luxembourg[604] contain provisions which explicitly prohibit lawyers from contacting witnesses. The Belgian as well as the Luxembourgian

[601] Previous research shows that it is quite rare that the defence carries out its own investigation, mostly due to lack of resources and powers: Cape et al 2010, p. 144-145 and p. 601.
[602] Art. 5.6 Code of Conduct for Solicitors.
[603] Code de déontologie de l'avocat 2013, Art. 7.16.
[604] Réglement intérieur de l'ordre des avocats du barreau de Luxembourg 2013, Art. 3.6.1.

regulations prescribe that the lawyer should refrain from any contact with any witness during proceedings. According to the Belgian regulations, contact with a witness is only possible in highly exceptional circumstances and only through written correspondence with that witness. The lawyer should at all times avoid any appearance of influencing this witness.[605] According to the Luxembourgian regulations, a lawyer is in principle prohibited from contacting witnesses in person, yet he is allowed to contact in writing persons whom he knows have witnessed facts of the case he is conducting. He may ask those persons to provide a written witness statement, but he may never use force to persuade this person to provide a statement or influence the witness. If these regulations are interpreted very strictly, it means that lawyers are also not allowed to contact witnesses for the defence in person. This raises practical and ethical questions on how lawyers and accused persons are able to effectively prepare the defence if they are not allowed to check with potential witnesses what they are going to testify.

3.2.3.2 Concluding Remarks

Regarding the matter of contacting witnesses throughout proceedings, specific regulations were identified in the general codes of conduct of 3 Member States, namely Ireland (solicitors), Italy and the Netherlands. According to these regulations, contact between the criminal defence lawyer and witnesses in criminal proceedings is allowed throughout proceedings, yet the lawyer is advised to avoid any appearance of influencing the witness. This means, for example, that the lawyer should not be too forceful when interviewing the witness or that he should not offer the witness any compensation for giving a statement. The Irish code of conduct for solicitors furthermore explicitly discourages criminal defence solicitors from contacting witnesses for the prosecution.

In the general codes of conduct of at least 12 Member States, provisions were identified regulating the lawyer's conduct when it concerns contacting witnesses, namely Austria, Belgium (Wallonia), Croatia, Denmark, Estonia, Finland, Ireland (barristers), Luxembourg, Malta, Slovakia, Sweden and England and Wales (solicitors and barristers). Of these Member States only Belgium (Wallonia) and Luxembourg explicitly prohibit lawyers from personally contacting any witness in the proceedings. If witnesses need to be contacted, the lawyer is only allowed to do so in writing. The general codes of conduct of the other Member States allow lawyers to contact witnesses, as long as the lawyer avoids any appearance of unauthorised influencing of the witness.

[605] Code de déontologie de l'avocat 2013, Art. 7.17.

3.2.4 Assistance of an Interpreter during Lawyer-Client Meetings

In the general codes of conduct of the EU Member States no regulations were found regarding the right to assistance of an interpreter during lawyer-client meetings. Yet, in light of the EU-Directive on interpretation and translation Member States will have to guarantee the availability of assistance of interpreters during lawyer-client.[606] Consequently, the lawyer will have to be aware of his duties in this matter. Firstly, he will have to ensure that a qualified and independent interpreter assists his client if there is a language barrier. This is particularly important at the police station, even if the police are obliged to arrange interpretation. Secondly, if the lawyer is of the opinion that the interpreter provided by the police is not reliable, he will have to (have) appoint(ed) another interpreter. At all times the confidential character of lawyer-client communications has to be observed. According to the EU Directive a national register of qualified interpreters should be available to the lawyer.

3.2.5 Informing the Client about the Case

The moment the criminal defence lawyer accepts a case, he is responsible for the legal assistance offered to the accused. Throughout criminal proceedings, the client will have to take crucial decisions, which will influence the rest of proceedings. This is why it is of fundamental importance that the lawyer informs his client on a regular basis about the progress of the case. Only the general code of conduct of Belgium (Flanders) contains a provision specifically mentioning lawyer's conduct in criminal proceedings regarding his duty to keep the client informed:

> "A lawyer is allowed to give his client a copy of the case file in which his client is personally involved, provided he respects the rules of prudence and discretion."[607]

Regarding legal assistance in juvenile criminal proceedings the general code of conduct explicitly provides that the lawyer is only allowed to discuss with the juvenile client and his parents the contents of certain parts of the case file concerning the juvenile's personality (*persoonlijkheidsdossier*); the lawyer is not allowed to provide the juvenile client or his parents with hard copies of these files. The code of conduct does not regulate such exceptions on providing hard copies of the case file to suspects and accused persons in criminal proceedings.

[606] See paragraph 2.2.4. of Chapter 2.
[607] Codex Deontologie voor advocaten 2018, Art. 79.

3.2.5.1 Relevant General Rules of Conduct regarding Informing the Client about the Case

In at least 9 Member States regulations were identified in the general codes of conduct concerning the lawyer's duty to keep his client informed about the progress of the case, namely in the Czech Republic,[608] Denmark,[609] Estonia,[610] Finland,[611] Italy,[612] Netherlands,[613] Poland,[614] Slovakia,[615] and Sweden.[616] According to all these regulations, the lawyer is obliged to keep his client duly informed of the progress of his case. The Italian provisions are the most elaborate and details the minimum level of information that has to be shared with the client. This includes information about duration and costs involved with representation, any actions necessary to avoid expiration of time limits, and any facts that have come to the lawyer's knowledge in the course of representation.

The Danish regulation specifically provides that this obligation exists "to a reasonable extent"; conversely the Italian provision obliges the lawyer to inform the client about the representation "and on the activities to be carried out, *indicating with precision* initiatives and possible solutions [emphasis added]" and the Czech, Finnish, Slovak and Swedish regulations state that the lawyer should answer any questions from the client promptly and without delay. The Estonian regulation provides that the information should be provided in the language of the enquiry if possible. Although it is not entirely clear from the wording of the provision, 'language of the enquiry' seems to imply that the lawyer should address the client in his own language as much as possible. In that regard it would be interesting to research how this relates to the previous subject on the assistance of an interpreter during lawyer-client meetings.[617] Only the Dutch regulation advises the lawyer to confirm any communication to the client in writing.

Lastly, a different approach to informing the client is found in the SRA Code of Conduct.[618] According to these regulations, solicitors should keep the client informed on all material relevant to case, except when legal restrictions prohibit disclosure in the interests of national security or the prevention of crime, the client consents to certain material not being disclosed to him, disclosure could cause serious physical or mental harm to the client or another person or the information has been disclosed to the solicitor by mistake. In practice,

[608] Rules of Professional Conduct of the Czech Republic 1996, Art. 9 § 1.
[609] Code of Conduct for the Danish Bar and Law Society 2011, Art. 9.2.
[610] Code of Conduct of the Estonian Bar Association 1999, Art. 14 § 4.
[611] Code of Conduct for Lawyers 2009, Art. 5.4.
[612] Code of Conduct for Italian Lawyer 2014, Art. 27.
[613] Rules of Conduct 2018, Rule 16 § 1.
[614] Rules of Ethics for Advocates and the Dignity of the Profession 2011, Art. 49.
[615] Rules of Professional Conduct for Lawyers 2004, Art. 6.
[616] Code of Professional Conduct for Members of the Swedish Bar Association 2009, Art. 2.3.
[617] See para. 3.2.4 of this Chapter.
[618] SRA Code of Conduct 2018, paragraph 6.4.

this means that the solicitor may be informed by the authorities on certain case material, which he may not (yet) disclose to his client.

3.2.5.2 Concluding Remarks

Regarding the lawyer's duty to keep the client informed about the progress of the case, specific regulations for criminal defence lawyers were identified in the general code of conduct of Belgium (Flanders) only. According to this rule, Belgian lawyers are allowed, but not obliged, to provide their clients in criminal proceedings with a copy of the case file.
The general codes of conduct of at least 9 Member States included regulations on the lawyer's duty to keep the client informed, namely in the Czech Republic, Denmark, Estonia, Finland, Italy, Netherlands, Poland, Slovakia, and Sweden. All regulations provide that the lawyer is obliged to inform his client about the progress of the case. This is an independent duty of the lawyer, meaning that the duty to inform the client is not made dependent on the client's enquiries about the progress of the case.

3.3 The Criminal Defence Lawyer as Trusted Counsellor

The duty of confidentiality is a universal principle, as already established in Chapter 2:[619] it can be found in European and international documents relating to professional ethics of lawyers, such as the IBA Principles,[620] the CCBE Code of Conduct[621] and the Havana Principles.[622] Closely related to the deontological duty of confidentiality is the legal concept of legal professional privilege. Legal professional privilege is important because it prevents third parties, including the State, from using privileged communication and materials in evidence without the accused knowing it. As such, legal professional privilege is primarily

[619] See Chapter 2, paras. 2.3 and 4.3.
[620] IBA Principles, general principle 4: "A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct."
[621] Charter of Core Principles of the European Legal Profession, principle B: "the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy." And CCBE Code of Conduct, Art. 2.3: "It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and what the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client It is therefore a primary and fundamental right and duty of the lawyer."
[622] Havana Principles, principle 22: "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

directed at third parties, outside the lawyer-client relationship. This is complemented by the duty of confidentiality, which is primarily directed at the defence lawyer, who should consider it as a norm for his conduct regarding his working relationship with the client. As such, the concept of confidentiality and professional privilege are inextricably linked: they not only protect the client's right to privacy, they are also a prerequisite for the existence of a lawyer-client relationship based on mutual trust.[623] Thus the duty of confidentiality and legal professional privilege are fundamental to a fair administration of justice and upholding these principles is in the general interest of anyone who relies on legal assistance.[624]

It should be noted here that this research primarily focuses on the rules of conduct for criminal defence lawyers. Since legal professional privilege is a legal concept, it is not often referred to in deontological regulations. Hence, in the following paragraphs focus will be primarily on the regulations regarding confidentiality and when relevant, reference will be made to deontological regulations dealing with legal professional privilege.

This paragraph follows a slightly different structure compared to the previous paragraphs. First, some specific aspects of the duty of confidentiality addressed in the general codes of conduct are described. Second, exceptions that were identified in the general rules of conduct are mentioned. Third, the application of the duty of confidentiality in disciplinary proceedings is addressed.

3.3.1 Specific Aspects of the Duty of Confidentiality as regulated in the General Codes of Conduct

All codes of conduct in EU Member States refer to the duty of confidentiality. Additionally, in some Member States, such as England and Wales and the Netherlands, the duty of confidentiality is statutorily regulated.[625] Often this duty is mentioned as one of the core duties of the lawyer at the beginning of the general code of conduct. The duty of confidentiality is not limited in time and continues after the client's death. Moreover, not only the lawyer, but also his colleagues and his support staff have a derivative duty of confidentiality.

---

[623] Pattenden & Skinns 2010, p. 359; Spronken 2001, p. 385; Boekman & Bannier 2007, p. 73; Dijk 2006, p. 440.
[624] Pinsler 2002, p. 210.
[625] In England and Wales the duty of confidentiality is regulated in LSA 2007, section 1(3)(e); in the Netherlands it is regulated in the Act on Advocates, Art. 11a. The text of the Dutch provision reads (as far as is relevant in this context): "As far as no exceptions have been made by the law or order of the Bar, each lawyer has to keep confidential any information that has come to his knowledge in the course of the exercise of the profession." This codification of the duty of confidentiality did not enter into force without some resistance. The main argument was that the wording of this regulation allowed for exceptions on the duty of confidentiality to be made by law or regulations, which would be a major intrusion on the professional independence of the legal profession.

The duty of confidentiality only applies to information that comes to the lawyer's knowledge when providing legal services. A relevant question in this respect is: what exactly is meant by 'providing legal services' and thus what information is actually covered by the duty of confidentiality? Only the general codes of conduct of Estonia, France, and Lithuania provide a more detailed description of information covered by confidentiality. According to the Estonian regulation the:

> "[…] confidentiality requirement shall also extend to include the fact of seeking legal assistance from the advocate, as well as to the content of such legal assistance and to the fees."[626]

Furthermore, the Estonian code of conduct provides that the lawyer has to keep separate records of all client materials to ensure confidentiality of those materials.[627] The Lithuanian regulation provides:

> "A professional secret of an advocate shall be comprised of the fact of consulting an advocate, terms of the agreement with a client, information and data provided by a client, character of consultation and data collected by an advocate upon a client's assignment."[628]

The French code of conduct quite elaborately details information that is covered by legal professional privilege, which explicitly includes not only physical material, but also for example e-mail.[629] Confidential information particularly includes correspondence between the lawyer and the client, the names of the client and the lawyer's diary and any agreement between the lawyer and client about the fees. This non-exhaustive list is thus similar to that mentioned in the Estonian and Lithuanian codes of conduct.

Nowadays a lot of information is gathered, stored and processed electronically. It is therefore obvious that lawyers will use computers, tablets or other electronic devices to store their client files. Lawyers, like all entrepreneurs working with confidential material, have to be aware of the importance of data protection. The Polish code of conduct is the only code that refers specifically to this matter:

[626] Code of Conduct of the Estonian Bar Association 1999, Art. 5 § 3.
[627] Code of Conduct of the Estonian Bar Association 1999, Art.16 § 1.
[628] Code of Professional Conduct for Advocates of Lithuania 2005, Art. 5.2.
[629] Réglement intérieur national de la profession d'avocat 1999, Art. 2.2.

> "An advocate using a computer or other means of electronic data recording in his work is required to use programming and other means of securing data against unauthorized disclosure."[630]

Although confidentiality and legal professional privilege are at the core of the provision of legal services, these principles are not absolute. It is therefore relevant to identify whether the codes of conduct provide regulations regarding circumstances which allow for an exception to the duty of confidentiality. For instance, is the lawyer allowed to disclose confidential information when the client consents to disclosure or if the lawyer has to defend himself against a disciplinary complaint or criminal charge?

3.3.1.1 Exceptions to the Duty of Confidentiality

The general codes of conduct of Austria,[631] Belgium (Wallonia),[632] Czech Republic,[633] Denmark,[634] Latvia,[635] Poland,[636] and Slovakia[637] do not provide any exceptions to the duty of confidentiality, at least not in the general codes of conduct.[638] Exceptions may, however, also be regulated by law, such as the legislation implementing money laundering directives of the EU.[639] In this paragraph, the exceptions to the duty of confidentiality as identified in the general codes of conduct of Belgium (Flanders),[640] Bulgaria,[641] Croatia,[642] Cyprus,[643]

[630] Rules of Ethics for advocates and the Dignity of the Profession 2011, Art. 19 § 5.
[631] Richtlinien für die Ausübung des Rechtsanwaltsberufes und für die Überwachung der Pflichten des Rechtsantwaltes und des Rechtanwaltsanwärters 1977, Art. II § 10.
[632] Code de déontologie de l'avocat 2013, Art. 1.2 (b).
[633] Rules of Professional Conduct of the Czech Republic 1996, Art. 6 § 4. In fact this provision explicitly states that the lawyer "may not use information he obtained from his client or has acquired about the client in the connection with the provision of the legal services to the detriment of the client or for his own benefit or the benefit of third parties".
[634] Code of Conduct for the Danish Bar and Law Society 2011, Art. 5 §1-2.
[635] Code of Ethics of the Latvian Sworn Advocates 1993, Art. 1.3.
[636] Rules of Ethics for advocates and the Dignity of the Profession 2011, Art. 19; Code of Professional conduct (for legal advisers) 2007, Art. 12.
[637] Rules of Professional Conduct for Lawyers 2004, Art. 9.
[638] It is however highly likely that regulations have been further developed in disciplinary case law so that exceptions to the duty of confidentiality have been allowed, for example the disclosure of confidential information in order to prevent a life-threatening situation. Examination of disciplinary case law in all EU Member States was however not included in this research.
[639] See for further reference for example CJEU 26 June 2007, C-305/05, ECLI:EU:C:2007:383 (*Ordre des barreaux francophones et germanophone et al./Conseil des Ministres*); Spronken & Fermon 2009, p. 460-461; Buruma 2011; Komárek 2008; Shaughnessy 2002.
[640] Codex deontologie voor advocaten 2018, Arts. 19 and 22.
[641] Attorneys-at-Law Ethics Code 2005, Art. 5.
[642] Attorneys' Code of Ethics 1999, Art. 34.
[643] Advocates' Code of Conduct Regulations 2002, Art. 13 § 7.

Estonia,[644] Finland,[645] Germany,[646] Ireland,[647] Italy,[648] Lithuania,[649] Luxembourg,[650] Malta,[651] the Netherlands,[652] Romania,[653] Scotland,[654] Slovenia,[655] Spain,[656] Sweden,[657] and England and Wales[658] are outlined.

The general codes of conduct of all these States, except Bulgaria, Cyprus, Germany, Italy, Romania, and Spain, provide that the lawyer is no longer bound by his duty of confidentiality when his client consents to disclosure. Additionally, the Belgian, Luxembourgian, Dutch, English, and Slovenian provisions explicitly mention that the lawyer should only disclose confidential information with the client's consent if this is in the client's best interests.

Exceptions to the duty of confidentiality can also be made, if this is prescribed by law. The general codes of conduct of Estonia, England and Wales, Finland, Malta, Scotland and Sweden explicitly refer to this exception by law. It is not unthinkable that statutory regulations regarding the lawyer's position make exceptions to the duty of confidentiality. For example, in the Netherlands the duty of confidentiality is statutorily regulated in the Act on Lawyers, Art. 11a. According to this regulation, exceptions to the duty of confidentiality can be made by law. At the same time, the fact that exceptions can be made by the legislature on a fundamental principle such as the duty of confidentiality does raise questions regarding the effect of such exceptions on the confidential lawyer-client relationship and the lawyer's professional independence. These issues are further addressed in Chapter 4.

Furthermore, the lawyer may breach his duty of confidentiality when this is necessary for his own defence. The general codes of conduct that provide for such an exception can be divided into codes which allow for such a breach when the lawyer has to defend himself in criminal proceedings (Bulgaria, Cyprus, Germany and Romania) or when he has to defend himself in disciplinary proceedings (Italy, Bulgaria, Cyprus, Ireland (barristers), Luxembourg, Romania, Malta and Sweden). The French, Belgian, Croatian, Finnish and Slovenian general

[644] Code of Conduct of the Estonian Bar Association 1999, Art. 5 § 2 and 8.
[645] Code of Conduct for Lawyers 2009, Art. 3.4 and particularly Art. 4.3.
[646] Rules of Professional Practice 2018, Art. 2 §§ 2-3.
[647] Code of Conduct for the Bar of Ireland 2019, Art. 3.7 (f); A Guide to Good Professional Conduct for Solicitors 2013, Art. 4.4.
[648] Code of Conduct for Italian Lawyers 2014, Art. 28 § 4.
[649] Code of Professional Conduct for Advocates of Lithuania 2005, Art. 5.2.
[650] Réglement intérieur De l'ordre des avocats du barreau de Luxembourg 2013, Art. 7.1.4.
[651] Code of Ethics and Conduct for Advocates (year unknown), Part 2, Chapter VI, Rule 3 and Rule 4.
[652] Code of Conduct 2018, Rule 3 § 3 and § 6.
[653] Statut de la profession d'avocat 2005, Art. 8 § 3.
[654] The Law Society of Scotland Practice Rules 2011, Section B – Art. 1.6 and Section C – Art. 4.4.18.
[655] Code of Professional Conduct of the Bar Association of Slovenia 2001, Art. 53.
[656] Code of Conduct of the Spanish Bar 2001, Art. 5 § 3.
[657] Code of Professional Conduct for Members of the Swedish Bar Association 2009, Art. 2.2.1.
[658] The BSB Handbook Version 4.3 (2019), rC15 § 5 and gC43; SRA Code of Conduct 2018, paragraph 6.3.

codes of conduct do not specify the kind of proceedings that allow a lawyer to breach his duty of confidentiality.

Lastly, some regulations are mentioned separately because these could not be categorised according to the themes discussed above. The Italian general code of conduct provides that a lawyer is allowed to disclose confidential information not only in disciplinary proceedings, but also if this would prevent a client from committing a serious crime[659] and if this is necessary to effectively defend his client. Moreover, the Italian lawyer is allowed to disclose confidential material to explain the circumstances of a dispute with his client. The Croatian provision is unique in allowing lawyers to disclose confidential information if this is necessary to justify the lawyer's decision to withdraw from his client's representation. Completely opposite to this provision is the Bulgarian general code of conduct, which explicitly provides that without "prejudice to Article 5, paragraph 4,[660] the reasons for withdrawing from an undertaken representation shall not be subject to disclosure".[661] The provisions in the general codes of conduct of Finland and Romania should also be mentioned here because they allow for a breach of confidentiality if this is necessary for the "collection of outstanding receivables from a client".[662]

3.3.1.2 Applicability of Duty of Confidentiality in Disciplinary Proceedings

If the duty of confidentiality applied unconditionally in disciplinary proceedings, this could prevent disciplinary law from working properly. On the one hand the lawyer might not be able to defend himself against the disciplinary complaint if he is restricted by confidentiality; on the other hand the supervising authority is not able to fully investigate the case if certain information cannot be shared. By way of illustration, the applicability of confidentiality in disciplinary proceedings in England and Wales and the Netherlands is further elaborated on in this paragraph.

In England and Wales, the starting point is that when a client initiates disciplinary proceedings against a solicitor, he has impliedly waived confidentiality with regard to dealings with this solicitor.[663] Conversely, it means that a solicitor who initiates proceedings

---

[659] A similar exception can be found in Dutch disciplinary case law, which leaves room for the lawyer to breach his duty of confidentiality if this could prevent life-threatening situations, see for example Spronken 2009, p. 549.

[660] Attorneys-at-Law Ethics Code 2005, Art. 5 § 4 reads: "An attorney-at-law may disclose confidential information only to the extent necessary to defend himself/herself in civil, administrative, penal, disciplinary or other proceedings related to attorney-at-law — client disputes."

[661] Attorneys-at-Law Ethics Code 2005, Art. 12 § 3.

[662] Code of Conduct for Lawyers 2009, Art. 4.3.

[663] *Lillicrap v Nalder* [1993] 1 WLR 94 and other decisions including *NRG v Bacon & Woodrow* [1995] 1 All ER 976, *Kershaw v Whelan* [1996] 1 WLR 358 and *Hayes v Dowding* [1996] PNLR 578.

against his client, for example to collect overdue fees, still has to uphold the duty of confidentiality, unless the client explicitly waives it.[664] It has been explained that the English legal profession is a split profession.[665] This is also noticeable in disciplinary proceedings. For example, a barrister can be requested by a solicitor who is being sued by his client, to provide a witness statement on the solicitor's behalf. The question then is, whether the barrister can consider the client's implied waiver of confidentiality to also reflect on the barrister-lay client relationship. Barristers are advised to only fulfil the solicitor's request if they have obtained written consent of the lay client to ensure that the duty of confidentiality towards this lay client is safeguarded.[666]

The Dutch general code of conduct prescribes that lawyers are obliged to cooperate with any disciplinary investigation conducted by presidents of local Bar Associations.[667] In order to facilitate this investigation, the lawyer may not invoke his duty of confidentiality, unless there are exceptional circumstances. Exceptional circumstances include neither the situation in which third parties have already unlawfully obtained knowledge of this confidential information, nor that the client might be unduly prejudiced if the confidential information were shared in public proceedings. In order to safeguard confidentiality and the position of the lawyer's clients, particularly in criminal proceedings, a disciplinary hearing can be held behind closed doors. This will, for example, be the case when a disciplinary complaint is filed by a public prosecutor against a lawyer.[668] Only when the outcome of disciplinary proceedings alone would already be sufficient for the public prosecutor to draw conclusions that are decisive in the criminal proceedings against the client, would this solution also be insufficient, constituting an 'exceptional circumstance' allowing the lawyer to invoke confidentiality.[669] Additionally, the prosecution may not use disciplinary proceedings to circumvent the right against self-incrimination; a lawyer cannot be forced to reveal any confidential information through disciplinary proceedings if this would possibly incriminate him or his client.[670] When a client files a disciplinary complaint against his lawyer, the lawyer can use confidential information provided by this client to defend himself against the complaint.[671]

---

[664] Boon 2014, p. 394.
[665] See para. 2.4 of this Chapter.
[666] Bar Council, "Confidentiality duty when previous instructing solicitors are sued", January 2014 (last reviewed November 2017), s. 4-6.
[667] Rules of Conduct 2018, Rule 29. See also Art. 45a § 3 Act on Lawyers, which explicitly provides that the duty of confidentiality does not apply for the benefit of supervision by the dean. The dean however has a similar duty of confidentiality as stated in Art. 11a. See also Art. 60d which refers to quality investigations by appointed rapporteurs.
[668] Spronken 2001, p. 523-524, including references.
[669] Spronken 2001, p. 524-525, including references.
[670] Raad van Discipline Den Bosch, 7 September 2015, ECLI:NL:TADRSHE:2015:193.
[671] Boekman 2012, p. 72, including references.

3.3.1.3 Concluding Remarks

The duty of confidentiality is widely recognised as one of the core principles governing the lawyer's conduct. It is fundamental to the lawyer-client relationship and to the rule of law as a whole. The duty of confidentiality is not limited in time, so that it continues after the client is deceased. The duty also extends to the lawyer's colleagues and personnel.

There is general consensus that all information that has come to the lawyer's knowledge in the course of the provision of legal services should be kept confidential. The general codes of conduct of 3 Member States, namely Estonia, France, and Lithuania, contain provisions which specify which information is covered by confidentiality. All 3 Member States provide that the fact that the client seeks legal advice is already covered by confidentiality, also the lawyer's diary and agreements on fee arrangement are covered by confidentiality. Currently, in an increasingly digitalised community, it is important to encourage lawyers to also safeguard the confidential character of digitally stored data. The Polish code of conduct for advocates explicitly provides that the lawyer is obliged to protect his electronic data against unauthorised access.

The duty of confidentiality is not absolute. Specific circumstances may allow exceptions to this duty. It has been established in this paragraph that the general codes of conduct of 19 Member States refer to exceptions to the duty of confidentiality. First, a client can waive confidentiality according to the codes of conduct of 14 Member States (Belgium (Flanders), Croatia, Estonia, Finland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Scotland, Slovenia, Sweden, and England and Wales). In five of these Member States, namely Belgium (Flanders), Luxembourg, the Netherlands, England and Wales, and Slovenia) the lawyer is only allowed to disclose confidential information with the client's consent if disclosure is in the client's best interests. This underlines the lawyer's independent position vis-a-vis his client. The lawyer has a duty to decide, from a professional point of view, whether disclosure of confidential information contributes to an effective defence.

Second, exceptions to the duty of confidentiality can be made by (national) law and regulations. The codes of conduct of 6 Member States refer to this exception by law, namely Estonia, England and Wales, Finland, Malta, Scotland and Sweden. It has been mentioned already that the fact that this might interfere with the lawyer's professional independence is further addressed in Chapter 4.

Third, the general codes of conduct of 14 Member States provide that the lawyer is allowed to breach confidentiality when this is necessary for his own defence either in criminal proceedings against him (Bulgaria, Cyprus, Germany and Romania) or in disciplinary proceedings (Italy, Bulgaria, Cyprus, Ireland, Luxembourg, Romania, Malta and Sweden). The five remaining Member States do not specify the kind of proceedings (France, Belgium (Flanders), Croatia, Finland and Slovenia). By way of illustration, the applicability of

confidentiality in disciplinary proceedings in England and Wales and the Netherlands have been further outlined in this paragraph. This illustration showed that in order for disciplinary case law to work properly, it is necessary to set aside confidentiality to enable any form of supervision over the legal profession. Yet, in the Netherlands, confidentiality of lawyer-client communication is still guaranteed to a certain extent, since the presidents of local Bar Associations who are responsible for supervision have an independent duty of confidentiality. Moreover, in very exceptional circumstances when the client's position in the proceedings might be jeopardised because of pending disciplinary proceedings against his lawyer, it is possible to conduct disciplinary proceedings behind closed doors. In England and Wales the client forfeits his right to confidentiality when he files a disciplinary complaint against his lawyer.

Lastly, exceptions to the duty of confidentiality were identified in the general codes of conduct when this would prevent the client from committing serious (life-threatening) crimes or if disclosure of confidential information is necessary for an effective defence (Italy); when it is necessary to explain reasons for withdrawing from a case (Croatia) and to claim outstanding fees (Finland and Romania).

3.3.2 Legal Professional Privilege

In the previous paragraph the deontological duty of the lawyer to keep confidential all information relating to the working relationship with his client was discussed. In this paragraph the legal concept of professional privilege is discussed. Together these concepts protect lawyer-client privilege on an intrinsic and an extrinsic level.

Legal professional privilege plays an important role when the premises of a lawyer are searched in the context of criminal proceedings, either against the lawyer himself or against a lawyer's client. In the general codes of conduct of 6 Member States, relevant regulations were identified which provide guidelines on lawyer's conduct when confronted with searches and seizures at their premises, namely Austria,[672] Czech Republic,[673] France,[674] Ireland,[675] Poland,[676] and Slovakia.[677] The Austrian, Czech, French, Polish and Slovak regulations oblige the lawyer to have a representative of the Bar present during the search

[672] Richtlinien für die Ausübung des Rechtsantwaltsberufes und für die Überwachung der Pflichten des Rechtsanwaltes und des Rechtanwaltsanwärters 1977, Art. 23a.
[673] Rules of Professional Conduct of the Czech Republic 1996, Art. 17a.
[674] Réglement intérieur national de la profession d'avocat 1971, Art. 2.2 (which refers more specifically to Art. 56-1 CCP, which elaborately regulates procedures concerning searches in lawyer's premises).
[675] Code of Conduct for the Bar of Ireland 2019, Art. 3.8; A Guide to Good Professional Conduct for Solicitors 2013, Art. 4.2.
[676] Rules of Ethics for advocates and the Dignity of the Profession 2011, Art 20.
[677] Rules of Professional Conduct for Lawyers 2004, Art. 9 § 4.

to safeguard confidentiality of certain material and the lawfulness of the search. Confidential material may only be seized if the Bar representative consents to seizure and disclosure of the material. Only the Czech regulations refer to additional regulation in (criminal) procedural law governing the situation when the representative refuses to provide consent. According to the Czech and Slovak regulations, the lawyer is obliged to inform the authorities conducting the search of his duty of confidentiality and professional privilege and the practical consequences of this duty. Lastly, the Irish regulations do not explicitly refer to searches and seizures at a lawyer's premises. According to the regulations of the Irish Bar Association, barristers are not permitted to allow access to confidential information to any persons, including members of the police, in any circumstances. It is not clear from this provision whether this also means that during searches the lawyer can refuse to allow access to confidential material. The code of conduct for Irish solicitors emphasises that the solicitor should always check the terms of the order or warrant requiring the production of certain material relating to a specific client. If these terms do not include disclosure of privileged material, the solicitor should retain that information.

The Austrian, Czech, French, Polish, and Slovak regulations do not make any distinction regarding the premises where the search is conducted. All these regulations, except the Czech, furthermore, explicitly mention that the lawyer is entitled or even obliged to invoke professional privilege when searches are conducted in the law firm and domestic or private residence. In the Czech regulation, no specific distinction is made, instead the more general criterion "premises in which the lawyer practises the legal profession" is used. In this regard it is also interesting to mention the Croatian general code of conduct here, which contains a provision that explicitly limits legal professional privilege to material located in the lawyer's office,[678] which seems to imply that confidential material at the lawyer's private premises is not privileged.

Lastly, the Cypriot general code of conduct should be mentioned here separately, which states:

> "Professional secrecy is recognised as the fundamental and primary right and obligation of advocates and must be protected by the Court and any State or public authority."[679]

As such, the Cypriot code is the only general code of conduct referring to procedural safeguards regarding the protection of legal professional privilege. According to the Cypriot regulation, a lawyer must invoke legal professional privilege if he is called as a witness and

[678] Attorneys' Code of Ethics 1999, Art. 28: "The attorney's secret refers to all documents, recordings, computer data, pictures and similar materials and deposits kept in the attorney's office."
[679] Advocates' Code of Conduct Regulations 2002, Art. 13 § 1.

answering certain questions would cause him to breach his duty of confidentiality. However, the same regulation also prescribes that the lawyer should withdraw from representation if he is called as a witness,[680] which raises the question how this relates to the lawyer's independent position in the criminal proceedings. This matter is further discussed in Chapter 4.

3.3.2.1 Concluding Remarks

In total 8 EU Member States, namely Austria, Croatia, Cyprus, Czech Republic, France, Ireland, Poland, and Slovakia provide regulations concerning legal professional privilege in their general codes of conduct. The deontological regulations which were identified in the general codes of conduct of Austria, Czech Republic, France, Ireland, Poland, and Slovakia commonly refer to the presence of a representative of the Bar during searches of the lawyer's premises in order to safeguard confidentiality of certain material. Moreover, it does not matter where the search is conducted, in the lawyer's professional or domestic premises. Either way, the material present at such a location, if related to the lawyer's profession, is covered by privilege. Only the Croatian general code of conduct limits the scope of professional privilege to the material located in the lawyer's office. Lastly, the Cypriot general code of conduct is the only general code of conduct emphasising that legal professional privilege is a primary right and obligation of lawyers, which should be respected and safeguarded by the judicial authorities and the Government.

3.3.3 Acceptance of Cases through Third Parties

The last aspect of the criminal defence lawyer's role as trusted counsellor concerns the acceptance of cases when the lawyer is retained not directly by the client, but through the intervention of a third party. Especially when the client is in custody it is conceivable that the suspect's family or friends will approach a criminal defence lawyer on his behalf. It should be noted that the third party in this paragraph is defined as a lay party, not a legal professional party, such as a solicitor or another lawyer. In none of the general codes of conduct under review specific regulations were identified referring to the acceptance of criminal cases through third parties. In the following, therefore, only relevant general regulations will be discussed.

[680] Advocates' Code of Conduct Regulations 2002, Art. 13 § 5.

In 5 Member States, namely Belgium (Flanders[681] and Wallonia[682]), Germany,[683] Ireland (solicitors),[684] Italy,[685] and Spain,[686] regulations were identified in the general codes of conduct which provide guidance to lawyers when they are approached by a third party to take on representation of a client. The Belgian regulations are the most elaborate and prescribe that the lawyer must check the identity of the third party and of the prospective client, must ensure that the instructions are lawful, and that the client agrees with the choice of lawyer. Moreover, the lawyer will have to uphold his duty of confidentiality towards his client, also within the context of the working relationship with the third party. Lastly, the lawyer will have to check whether there is a (potential) conflict of interests between the prospective client and the third party. The German and Spanish regulations do not explicitly mention that lawyers are allowed to accept a case from a third party on behalf of the client; however, the regulations state that payments on behalf of the client can be made by third parties. Therefore, these regulations are still mentioned in this paragraph. Lastly, the Italian and Irish regulations emphasise that the lawyer may only accept a case through a third party if the client voluntarily and explicitly consents to the representation by this lawyer.

It becomes clear from these regulations that the core principles of professional independence and partiality are crucial when deciding on whether or not to accept a case from a third party. The fact that the lawyer's professional independence can easily be compromised when his fees are being paid not by the client himself but by a third party is explicitly mentioned in the general codes of conduct of the Netherlands.[687] Furthermore, by requiring the lawyer to check with the client whether he actually agrees with the representation, the client's right of freedom to choose his lawyer is respected. This benefits the lawyer's duty of partiality and confidentiality towards this client.

Against the background of partiality and the client's freedom to choose his own lawyer, the general codes of conduct of Austria,[688] Croatia,[689] Cyprus,[690] Denmark,[691] Malta,[692] and Scotland[693] stipulate that the lawyer is only allowed to accept instructions directly from the client, from another lawyer on behalf of the client, or from a public authority or other

[681] Codex Deontologie voor advocaten 2018, Art. 66.
[682] Code de déontologie de l'avocat 2013, Art. 7.1.
[683] Rules of Professional Practice 2018, Art. 16 and 21.
[684] A Guide to Good Professional Conduct for Solicitors 2013, Art. 2.1.
[685] Code of Conduct for Italian Lawyers 2014, Art. 23.
[686] Code of Conduct of the Spanish Bar 2001, Art. 13 § 2.
[687] Rules of Conduct 2018, guidance to Rule 2 on professional independence.
[688] Richtlinien für die Ausübung des Rechtsanwaltsberufes und für die Überwachung der Pflichten des Rechtsantwaltes und des Rechtsanwaltsanwärters, 1977, Art. 11.
[689] Attorneys' Code of Ethics 1999, Art. 18.
[690] Advocates' Code of Conduct Regulations 2002, Art. 20.
[691] Code of Conduct for the Danish Bar and Law Society 2011, Art. 8.1.
[692] Code of Ethics and Conduct for Advocates (year unknown), Part 2 Chapter II rule 5.
[693] Code of Conduct for Scottish Solicitors 2002, Art. 5a.

competent body. These regulations therefore do not allow lawyers to accept cases through third parties. In the other Member States no regulations were identified in the general codes of conduct concerning the acceptance of cases through third parties.

In sum, it has to be concluded that the client's interests are paramount. Even in the rare instances where it is possible for a lawyer to accept cases from a third party, the lawyer will still have to obtain the client's voluntary and explicit confirmation that he agrees with the representation. Without such confirmation it will be quite difficult for the lawyer to maintain his independent position and build a working relationship with the client based on mutual trust.

3.4 The Criminal Defence Lawyer as Spokesperson

In this paragraph, two aspects of the criminal defence lawyer's role as spokesperson are discussed, namely the freedom of defence, more specifically the criminal defence lawyer's role in court, and the criminal defence lawyer's conduct in the media.

3.4.1 Freedom of Defence

The criminal defence lawyer has a professional duty to defend the accused in the most efficient way and should be granted the necessary freedom to conduct the defence of his client. This freedom is, however, bound by certain limitations. Since no regulations in the general codes of conduct were identified specifically referring to the conduct of *criminal* defence lawyers on this matter, this paragraph focuses on the general regulations which are relevant regarding the lawyer's conduct in court.

3.4.1.1 Relevant General Rules of Conduct regarding the Lawyer's Freedom of Defence

First, the majority of EU Member States provide for a regulation in their general codes of conduct prohibiting the lawyer from knowingly deceiving or misleading the court by providing false or untrue information.[694] At the same time, this obligation does not mean that the lawyer is not free to utilise all legal means to effectively defend the accused. In some

[694] To keep this footnote concise, all Articles cited hereafter can be found in the general codes of conduct as referred to throughout this research: Bulgaria (Art. 23), Croatia (Art. 93), Cyprus (Art. 7 §§ a and b), Czech Republic (Art. 17 § 2), Estonia (Art. 21 § 2), Finland (Art. 8.2), Ireland-Barristers (Art. 5.3), Ireland-Solicitors (Arts. 4.4 and 5.6), Italy (Art. 50), Latvia (Art. 7.3), Lithuania (Art. 10.3), Malta (Part 4, Chapter 1, Art. 1), the Netherlands (Rule 8), Poland-Advocates (Art. 11), Scotland (Art. 8), Slovakia (Art. 14 § 2), Slovenia (Art. 20), Sweden (Art. 6.2.1), England and Wales-Barristers (Rule rC6) and England and Wales-Solicitors (Paragraph 2.4).

general codes of conduct this is explicitly regulated. The Latvian general code of conduct emphasises that the lawyer has to defend his client "bravely, fairly and persistently without harming the guaranteed rights of the state and other persons".[695] In the Dutch general code of conduct reference is made to standing disciplinary case law in which the lawyer has a high degree of freedom to represent the interests of his client as he considers appropriate. However, this freedom is not absolute: the lawyer is not allowed to "unnecessarily and inadmissibly harm the legitimate interests of others",[696] such as the interests of witnesses or victims. Similar provisions can be found in the general codes of conduct of Poland[697] and Sweden.[698] According to the Estonian general code of conduct, such freedom includes that the lawyer should be allowed to express his critical opinion about judicial proceedings or the functioning of other participants in the proceedings, as long as the lawyer shows appropriate respect towards the court and criticism is not expressed in the media or in public.[699]

Second, the lawyer will have to show respect for the court, although this obligation should never impede him from saying anything that he finds relevant and necessary in the interests of the defence.[700] Regarding the matter of showing respect to the court, regulations were found in the general codes of conduct of 15 EU Member States.[701] In some Member States lawyers have an explicit duty to the court, which includes not misleading the court (England and Wales) or assisting the court and safeguarding "the client's legal rights and benefits" (Slovenia). Also in Ireland the lawyer has a duty to the court, although the general codes of conduct in Ireland mention explicitly that this does not include a duty to comment on an incomplete list of a client's previous convictions.[702] Other regulations are of a very practical nature, prescribing that the lawyer should always be properly dressed in professional attire (Malta and Germany). In general, however, the provisions state that the lawyer has moral obligations towards the court (Lithuania), which means that his conduct has to be honest, loyal and respectful of the court and other authorities and honour the dignity of the legal profession (Cyprus, Czech Republic, Slovakia, Spain). Other regulations emphasise that a lawyer should not make any insulting statements or derogatory comments about the judge's decisions (Croatia, Italy, Finland) or disrupt the normal course of

[695] Code of Ethics of the Latvian Sworn Advocates 1993, Art. 7.2.
[696] Rules of Conduct 2018, guidance to Rules 6 and 8.
[697] Rules of Ethics for advocates and the Dignity of the Profession 2011, Art. 16.
[698] Code of Professional Conduct for Members of the Swedish Bar Association 2008, Art. 6.3.2.
[699] Code of Conduct of the Estonian Bar Association 1999, Art. 20 § 1.
[700] Spronken 2001, p. 597.
[701] All Articles cited hereafter can be found in the general codes of conduct as referred to throughout this dissertation: Bulgaria (Art. 24), Croatia (Art. 85-99, particularly Art. 92), Cyprus (Art. 33), Czech Republic (Art. 17 § 1), Denmark (Art. 18.1), England and Wales – barristers (Rules rC3-rC6), Finland (Art. 8.1), Germany (Art. 20), Italy (Art. 50), Lithuania (Art. 1.2.2), Luxembourg (Art. 1.2 and 3.2.1), Malta (Part 4, Chapter 1, Art. 7), Slovakia (Art. 29), Slovenia (Art. 18-20), Spain (Art. 11 sub a).
[702] A Guide to Good Professional Conduct for Solicitors 2013, Art. 5.6; Code of Conduct for the Bar of Ireland 2019, Art. 10.17.

proceedings (Bulgaria, Denmark). The Luxembourgian general code of conduct explicitly mentions proper conduct towards courts and other parties in the proceedings as one of the basic principles.[703]

3.4.1.2 Concluding Remarks

In sum, it can be concluded from the regulations which were identified in 22 EU Member States that a lawyer enjoys considerable freedom to conduct the defence of his client as he deems appropriate. This freedom of defence is, however, not absolute. It may be limited by the lawyer's duty to the court, his obligation not to provide false or untrue information to the court, and his obligation to safeguard the legitimate interests of others such as witnesses and victims. Moreover, lawyers are expected to conduct themselves in a respectful, loyal and honest manner towards the courts. In the regulations identified in this paragraph, the constant balance between the lawyer's duty to act in the client's best interests and his duties to the court and other participants in the proceedings is clearly visible.

3.4.2 The Lawyer's Performance in the Media

The media (including *conventional media,* such as newspapers, television and radio, and *new media,* such as social media, blogs and websites) play an important role in today's society. Criminal cases, particularly when victims are involved, are often reported by the media and nowadays it is not uncommon for journalists to conduct their own investigation alongside the criminal investigation. Persons subject to such publications are easily stigmatised for life as suspects or even perpetrators of often very serious crimes. Even if they are not prosecuted, or are acquitted, or if they have served their sentence, the publications remain available on the internet for an indefinite period of time. This will make rehabilitation very difficult if not impossible. Criminal defence lawyers have to be aware of this effect and it is therefore interesting to analyse the general codes of conduct and identify any relevant regulations regarding the criminal defence lawyer's performance in the media.

The general codes of conduct of Belgium (Wallonia and Flanders), Croatia, France, and Luxembourg contain specific provisions regarding the lawyer's performance in the media in criminal proceedings. The Belgian, French and Luxembourgian regulations use the same starting point: criminal defence lawyers should not make comments in the media about

[703] Réglement intérieur De lórdre des avocats du barreau de Luxembourg 2012, Art. 1.2: "Dans ses relations avec l'adversaire, son mandant, la magistrature ou toute autre personne, l'avocat se doit d'adopter un ton modéré et poli, en s'abstenant de tous termes blessants ou injurieux et évitera d'utiliser un ton méprisant, arrogant ou hautain étant entendu que la moderation, la délicatesse et la courtoisie doivent rester l'apanage de la profession."

pending cases. However, all regulations provide exceptions to this starting point. According to the Wallonian code of conduct a lawyer:

> "[…] refrains from communicating to any third party copies of writings and pleadings. The lawyer is authorized to submit to the media notes or arguments written for them, in accordance with the principles recalled in the preceding Article, to the extent that the defence of the rights of the client justifies it and with the express agreement of the latter. The lawyer has to duly inform the other parties of this communication. In criminal cases, he may communicate to the media, under the same reservations, copies of the writings and pleadings provided that: 1° these have been previously communicated and filed; 2° the debates are public; 3° the other parties and the public prosecutor are informed of this communication, at the latest at the moment it takes place; 4° the law does not oppose it. This communication, for which the lawyer is responsible, should be fair and without prejudice to the rights of third parties." [704]

A similar provision can be found in the Flemish general code of conduct:

> "158.1 A lawyer may not conduct his case in the media and must refrain from all commentary, except if the principle of equality of arms makes a response necessary following statements by the public prosecution service, the judge responsible for briefing the press, or third parties in the media.
> 158.2 A lawyer must ensure that he has prior consent from his client to make public statements.
> 158.3 He must also bear the interests of his client and just case in mind.
> 158.4 His involvement must show care, including with regard to the justified interests of third parties.
> 158.5 A lawyer must, where possible, consult his chairman in advance, obtain his opinion and follow his guidelines. He must do this in any case when he must take over from a predecessor or give commentary on his activity in the case […]." [705]

The starting point of both regulations is that the criminal defence lawyers abstains from making comments in the media, unless it is in the best interests of the client. According to the Flemish code of conduct, comments may only be made in the media in response to statements made in the media by the public prosecutor, the judge or third parties. Both regulations furthermore demand that the criminal defence lawyer obtains his client's prior

[704] Code de déontologie de l'avocat 2013, Art. 7.9.
[705] Codex deontologie voor advocaten 2018, Art. 158.

consent . Additionally, criminal defence lawyers who practise in Wallonia are only allowed to share information with the media if this information has already been made public and if the other parties to the proceedings have been informed. They may also share copies of case material with the media.

The French and Luxembourgian general codes of conduct use a similar starting point, but the provisions in these codes are much less elaborate and more strict. Both regulations emphasise the secret character of the criminal investigation, which is the main argument for not allowing criminal defence lawyers to make comments in the media, except when this is in the best interests of the defence:

> "The lawyer respects the secrecy of the criminal investigation, by refraining from the communication of case materials and from publishing material relating to a current criminal investigation, except when this would be necessary in relation to the exercise of defence rights. He may not provide copies of the case file to his client or third parties, except in the circumstances provided in Art. 114 of the Code of Criminal Procedure." [706]

> "The lawyer, without prejudice to the rights of the defence, must respect the secrecy of the criminal investigation by refraining from communicating case material relating to a current investigation. He is only allowed to communicate case material to his client for the purpose of the defence." [707]

Lastly, according to the Croatian general codes of conduct, criminal defence lawyers are not allowed to share any information with third parties or the media when criminal cases are still pending. A Croatian criminal defence lawyer:

> "[…] shall not make public statements in the course of a criminal action that may have an impact on the progress and outcome of the proceedings." [708]

The Croatian provision does not mention the exception of allowing lawyers to comment in the media when this is in the best interests of their client.

[706] Réglement intérieur national de la profession d'avocat 1971, Art. 2 bis.
[707] Réglement intérieur De l'ordre des avocats du barreau de Luxembourg 2013, Art. 7.2.
[708] Attorneys' Code of Ethics 1999, Art. 67.

3.4.2.1 Relevant General Rules of Conduct regarding the Lawyer's Performance in the Media

Relevant general rules of conduct were identified in the general codes of conduct of 12 EU Member States. Lawyers in Austria,[709] Czech Republic,[710] England and Wales,[711] Finland,[712] Germany,[713] Italy,[714] the Netherlands,[715] Poland,[716] and Slovenia[717] are allowed to express their (personal) opinion about pending cases in the media. In doing so, they may need the prior consent of their client (explicitly provided for in the codes of conduct of Austria, Finland, Italy and the Netherlands) and some provisions also emphasise that the lawyer should at all times take into account his duty of confidentiality towards his client when sharing information with the media (Czech Republic, the Netherlands). According to the Polish regulations, advocates are allowed to express their opinion in the media, as long as they do not violate the dignity of the legal profession; Slovenian lawyers are only allowed to appear in the media if it is absolutely necessary.

On the other hand, lawyers in Cyprus,[718] Ireland,[719] and Malta[720] are not allowed to express their (personal) opinion in the media concerning pending cases. The Irish regulations make one exception for the publication of copies of pleadings, with the prior consent of the client.

3.4.2.2 Concluding Remarks

Regarding the criminal defence lawyer's performance in the media, specific regulations were identified in the general codes of conduct of four EU Member States, namely Belgium (Wallonia and Flanders), Croatia, France and Luxembourg. Only in Belgium are criminal defence lawyers allowed, under certain conditions, to communicate to the media about cases which are still pending. In France and Luxembourg the secrecy of criminal investigations prohibits criminal defence lawyers from publishing any information about a

[709] Richtlinien für die Ausübung des Rechtsanwaltsberufes und für die Überwachung der Pflichten des Rechtsanwaltes und des Rechtsanwaltsanwärters 1977, Art. 47.
[710] Rules of Professional Conduct of the Czech Republic 1996, Art. 25.
[711] BSB Handbook Version 4.3 (2019), gC22.
[712] Code of conduct for lawyers 2009, Art. 10.1.
[713] Rules of Professional Practice 2018, §6 (2).
[714] Code of Conduct for Italian Lawyers 2014, Art. 18 (1).
[715] Rules of Conduct 2018, guidance to Art. 3.
[716] Rules of Ethics for advocates and the Dignity of the Profession 2011, Arts. 17 and 18 (3).
[717] Code of Professional Conduct of the Bar Association of Slovenia 2001, Art. 25.
[718] Advocates' Code of Conduct Regulations 2002, Art. 19 (3).
[719] Code of Conduct for the Bar of Ireland 2019, Art. 6.9.
[720] Code of Ethics and Conduct for Advocates (year unknown), Part 4, Chapter 1, Rule 8.

pending criminal case, and in Croatia a criminal defence lawyer has to refrain from any communication to the media if this would obstruct the progress of criminal proceedings.

Furthermore, in the general codes of conduct of at least 12 EU Member States relevant regulations were identified concerning the lawyer's performance in the media, namely in Austria, Cyprus, Czech Republic, England and Wales, Finland, Germany, Ireland, Italy, Malta, the Netherlands, Poland and Slovenia. Only Cyprus, Ireland and Malta prohibit their lawyers from communicating to the media about pending cases. In Ireland, lawyers are only allowed to publish copies of pleadings, and then only if their client consents. In Poland, only legal advisers are not allowed to appear in the media.

Most of the regulations identified in this paragraph emphasise that the lawyer needs prior consent of the client to be able to communicate in the media about the client's case. Moreover, the majority of regulations urge the lawyer to put the client's interests first and consider the fact that the trial should not be conducted in the media but in the courtroom.

3.5 Conclusion

In the previous paragraphs the general codes of conduct of EU Member States have been analysed to identify regulations which are relevant for the conduct of criminal defence lawyers who assist suspects and accused persons in criminal proceedings. In this concluding paragraph an overview is provided of the main findings of this analysis. This analysis is structured according to the four roles of the criminal defence lawyer: legal representative, strategic adviser, trusted counsellor and spokesperson.

3.5.1 The Criminal Defence Lawyer as Legal Representative

Several aspects of the criminal defence lawyer's role as legal representative have been analysed in this paragraph. First, the matter of acceptance of, refusal of, and withdrawal from a (criminal) case was researched. In the general codes of conduct of 6 Member States (Croatia, Cyprus, Estonia, Ireland (barristers), Italy, and Slovenia) specific regulations for criminal defence lawyers were found, which had in common that they urged lawyers to accept criminal cases irrespective of personal beliefs, amount of evidence, severity of the alleged offence, or the client's presumed guilt. These regulations underline the independent position of the criminal defence lawyer and ensure that accused persons will have legal representation throughout proceedings. Some of the regulations even go a step further by obliging the lawyer to accept a case when they are appointed by the court or another authority (Estonia) or require a sufficient explanation from the lawyer if he wishes to withdraw from a case (Cyprus and Italy). Relevant general regulations on acceptance of, refusal of, and withdrawal from cases were identified in another 12 Member States (Czech

Republic, Denmark, England and Wales, Finland, Latvia, Lithuania, Malta, the Netherlands, Poland, Scotland, Spain, and Sweden). The minority of these provisions make a distinction between appointed and chosen lawyers (Czech Republic, Finland, and Poland), because only appointed lawyers are not allowed to refuse a case unconditionally according to these regulations. Although such regulations are understandable from the viewpoint of the authorities, it might raise serious deontological challenges for the lawyers involved. Particularly if, for any reason, the lawyer-client relationship is not easily established, the lawyer might find himself caught between the interests of the authorities (expeditious and efficient proceedings) and the interests of the accused (building a fiduciary lawyer-client relationship in order to effectively defend the accused's interests). As such, the lawyer's core principles of professional independence and confidentiality may conflict. This issue is further addressed in Chapter 4. In the 9 remaining Member States (Denmark, England and Wales, Latvia, Lithuania, Malta, the Netherlands, Scotland, Spain, and Sweden) the regulations identified generally provide that lawyers are free to accept or refuse a case, although restrictions may apply. The English regulations in particular are quite elaborate in summing up the conditions for acceptance and refusal of cases.

In elaboration on the acceptance or refusal of and withdrawal from cases, the defence of accused persons with conflicting interests has also been taken into account in this research. Most general codes of conduct in the EU Member States refer to the lawyer's duty to prevent conflicts of interests. This duty relates to the core principles of confidentiality, partiality and professional independence. In 6 Member States, specific regulations for the criminal defence lawyer were identified (Croatia, Ireland (barristers), Italy, Poland, Scotland, and Sweden). All regulations, except the Italian regulation, prohibit a joint defence if it is clear from the outset that the co-suspects have or can have a conflict of interests. The Scottish regulation is the strictest in prescribing that joint defence of co-suspects is only allowed in exceptional circumstances; however, the regulations do not elaborate on what should be considered exceptional circumstances.

In addition, in the general codes of conduct of 19 Member States, relevant regulations were identified on the lawyer's conduct when confronted with a request for representation of more than one client in the same case. Of these Member States the general regulations in 11 Member States (Bulgaria, Cyprus, Czech Republic, Ireland (solicitors), Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia and Spain) prohibit representation of clients in the same matter if the interests of these clients are (potentially) conflicting. In 8 Member States (Belgium, Finland, Denmark, Estonia, France, Latvia, the Netherlands and England and Wales) representation of more than one client in the same case is not prohibited. However, these regulations emphasise that the lawyer has a greater responsibility to inform all clients involved about the risks and consequences of the joint representation and all clients will have to provide prior and written consent to the joint representation. Moreover, Denmark and

Latvia specify the nature of the conflicting interests. Representation of more than one client in the same case, even if they have conflicting interests, is only allowed if the conflict is of a "not-insignificant nature" (Denmark) or if it concerns representation "outside the Court" (Latvia).

Another aspect of the criminal defence lawyer's role as legal representative concerned the issue of *dominus litis*. Specific regulations for criminal defence lawyers were identified in the general codes of conduct of 6 Member States (Croatia, Estonia, Ireland, Lithuania, Malta, and Scotland). The Croatian and Estonian regulations make a clear distinction between factual and legal arguments as the basis of the defence strategy. Both regulations emphasise that the lawyer is in charge of the legal arguments, while the client is in charge of the facts. The Maltese, Lithuanian and Irish regulations focus more on the relationship between the lawyer and the client. The Maltese regulation essentially presents the lawyer as the spokesperson of the legally ignorant lay client, while the Lithuanian and Irish regulations emphasise that the lawyer serves the interests of the accused. The Irish regulation is very clear that the lawyer should enable the accused to make an informed final decision on the defence strategy. It is less clear from the Lithuanian regulation who is actually in charge of the defence, but it is emphasised in this regulation that the lawyer should always confer with the client and should never do anything without the client's awareness.

Additionally, in the general codes of conduct of 7 Member States (Finland, Ireland (solicitors), the Netherlands, Poland, Slovenia, Spain, and Sweden) relevant general regulations on the issue of *dominus litis* were identified. The wording of all these regulations varies considerably, which makes it difficult to categorise these regulations. Yet, all regulations have in common that they stress the independent position of the lawyer towards his client: lawyers should never let themselves be dictated to by the preferences of their client. However, the specific implementation of this starting point differs per Member State. The Netherlands, Poland, Finland and Spain prescribe that the lawyer has to withdraw in the event of an insurmountable disagreement with the client about the conduct of the case. The Swedish and Slovenian regulations do not provide guidance on the situation where a disagreement between the lawyer and the client arises. Both regulations underline the lawyer's obligation to provide independent advice and information about the case to his client and to maintain his professional independence by not letting himself be led by his client's preferences. The Irish code of conduct explicitly states that the client is the principal.

Lastly, regarding the aspect of legal aid, no specific regulations for criminal defence lawyers could be identified in the general codes of conduct. Yet, general regulations were identified in the general codes of conduct of 10 Member States (Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Ireland (solicitors), the Netherlands, Slovenia, and Sweden). Generally, these regulations refer to the duty of the lawyer to inform his client about the availability of legal aid if he has reason to believe that the client might be eligible for legal

aid. Additionally, the question whether a lawyer is allowed to accept additional fees from clients or third party, if he is already assisting this client on the basis of legal aid, is answered by the Estonian, Dutch, German and Swedish regulations. Of these 4 Member States, only Germany allows its lawyers to accept additional fees, provided the lawyer has informed his client properly that his client is not obliged to offer an additional fee and provided that the client offers the fee voluntarily. In the general codes of conduct, no regulations were identified covering mechanisms to guarantee and monitor the quality of legal aid providers. The EU Directive on Legal Aid, however, requires Member States to ensure the quality of legal aid. By way of illustration the monitoring mechanisms in England and Wales and the Netherlands were further explored. It followed from this exploration that the English regulations are much more detailed and elaborate. There are not only general quality marks, but also very specific criminal accreditation schemes. Accreditation in England and Wales is executed by an independent and knowledgeable assessment organisation. The Dutch monitoring mechanisms consist of strict admission criteria for legal aid providers in criminal cases and the Dutch national Bar Association is developing quality tests, *intervisie* and peer review, which are used to monitor legal aid providers.

3.5.2 The Criminal Defence Lawyer as Strategic Adviser

When analysing the criminal defence lawyer's role as strategic adviser, the deontological challenges concerning advising on silence and out-of-court settlement, for example by plea bargaining, are most prominent. It should be noted that in almost the majority of the EU Member States plea bargaining is part of the criminal justice system. Still, regarding advising on out-of-court settlement, more specifically on plea bargaining, the general codes of conduct of only 5 Member States (England and Wales, Estonia, Ireland, Lithuania, and Scotland) provide relevant regulations. The main difference between these regulations is that, while lawyers in England and Wales, Ireland, and Scotland are bound by the client's plea of guilty (in which case they are not allowed to set up an active defence based on the suspect's innocence), lawyers in Estonia and Lithuania are only bound by the client's plea of not guilty. Even more so, if the suspect in Estonia or Lithuania wants to plead guilty and the lawyer is of the opinion that the suspect's guilt cannot be derived from the evidence in his case, then the lawyer will have the authority to decide on the defence strategy independently from the client.

None of the general codes of conduct provide regulations on advising the accused on his right to silence. This is actually not very surprising since this is an issue which is primarily a feature of criminal procedural law. Still, advising on the right to silence is a vital aspect of the criminal defence lawyer's role as strategic adviser. At the same time it is a very delicate and

challenging aspect, which has been illustrated in this Chapter by explaining the deontological challenges faced by English criminal defence lawyers.

Another important aspect of the role of strategic adviser is the lawyer's responsibility to thoroughly prepare the defence. This, among other things, includes collecting as much information as possible about the client's case. Since this information often originates from witnesses, contact with witnesses is crucial for a defence lawyer. The general codes of conduct of 3 Member States (Ireland (solicitors), Italy, and the Netherlands) include specific regulations governing the conduct of criminal defence lawyers regarding contacting witnesses. Although these regulations allow criminal defence lawyers to have contact with witnesses throughout proceedings, they also very clearly emphasise that lawyers are under no circumstance allowed to influence the witnesses. The Irish code of conduct even explicitly discourages criminal defence solicitors from having contact with witnesses for the prosecution. Additionally, in the general codes of conduct of at least 12 Member States (Austria, Belgium (Wallonia), Croatia, Denmark, Estonia, Finland, Ireland (barristers), Luxembourg, Malta, Slovakia, Sweden, and England and Wales (solicitors and barristers)), relevant provisions were identified regulating the lawyer's conduct when it concerns contacting witnesses. Of these Member States only Belgium (Wallonia) and Luxembourg explicitly prohibit lawyers from personally contacting any witness in the proceedings. If witnesses need to be contacted, the lawyer is only allowed to do so in writing. The general codes of conduct of the other Member States allow lawyers to contact witnesses, as long as the lawyer avoids any (appearance of) unauthorised influencing of witnesses.

Since 27 October 2013, following the EU Directive on interpretation and translation, Member States are obliged to ensure availability of assistance of qualified interpreters during the entire criminal proceedings, including lawyer-client meetings. This is particularly important at the police station, even if the police are obliged to arrange for an interpreter. At all times the confidential character of lawyer-client communications has to be observed and therein lies an important duty for the criminal defence lawyer. In the general codes of conduct, however, no regulations could be identified regarding this aspect of the criminal defence lawyer's role as strategic adviser.

The last aspect of the criminal defence lawyer's role as strategic adviser researched was the lawyer's duty to keep his client informed about the progress of the case. Only in the general code of conduct of Belgium (Flanders) was a specific regulation for criminal defence lawyers identified. According to this rule, Belgian lawyers are allowed, but not obliged, to provide their clients in criminal proceedings with a copy of the case file. In the general codes of conduct of at least 10 Member States (Czech Republic, Denmark, England and Wales, Estonia, Finland, Italy, Netherlands, Poland, Slovakia, and Sweden), relevant regulations were identified. All of these regulations provide that the lawyer is obliged to inform his client about the progress of the case. This is an independent duty of the lawyer, meaning that the duty to

inform the client is not made dependent on the client's enquiries about the progress of the case. Additionally, only the English regulations provide that the solicitor may be prohibited to share all information with his client, when sharing this information would be undesirable in light of national security or the prevention of crime or to prevent harm to others.

3.5.3 The Criminal Defence Lawyer as Trusted Counsellor

With regard to the role of the criminal defence lawyer as trusted counsellor, three aspects were researched: the duty of confidentiality, legal professional privilege and accepting instructions from third parties. The duty of confidentiality is widely recognised as one of the legal profession's core principles. It is fundamental to the lawyer-client relationship and to the rule of law as a whole, and is therefore referred to in all general codes of conduct under review. The general codes of conduct of 4 Member States (Estonia, France, Lithuania, and Poland) contain more detailed regulations specifying what material is covered by confidentiality. According to the Estonian, French, and Lithuanian codes of conduct, the fact that the client is seeking legal advice infers that the lawyer's diary and agreements on fee arrangements should be covered by confidentiality. Furthermore, the general code of conduct of Poland makes lawyers aware of the importance of protecting confidentiality of digitally-stored material.

The duty of confidentiality is not absolute; specific circumstances may allow exceptions to this duty. It has been established in this paragraph that the general codes of conduct of 19 Member States (Belgium (Flanders), Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Romania, Scotland, Slovenia, Sweden, and England and Wales) refer to exceptions to the duty of confidentiality. First, confidentiality can be waived by the client (Belgium (Flanders), Croatia, Estonia, Finland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Scotland, Slovenia, Sweden, and England and Wales). Belgium, England and Wales, Luxembourg, the Netherlands, and Slovenia further specify that the lawyer is only allowed to disclose confidential information if the client consents and if disclosure is in the client's best interests. Second, exceptions to confidentiality can be made by (national) law and regulations (Estonia, England and Wales, Finland, Malta, Scotland and Sweden). Third, confidentiality can be breached if this is necessary in the lawyer's own defence, either in criminal proceedings against him (Bulgaria, Cyprus, Germany and Romania) or in disciplinary proceedings (Italy, Bulgaria, Cyprus, Ireland, Luxembourg, Romania, Malta and Sweden) or in both or any other proceedings (France, Belgium (Flanders), Croatia, Finland and Slovenia). Fourth, an exception can be made to the duty of confidentiality if disclosing certain confidential information could prevent a life-threatening situation or if disclosure of confidential information is necessary for an effective defence (Italy). Fifth, when disclosure of confidential material is absolutely necessary to

explain reasons for withdrawing from a case (Croatia). Sixth, when exceptions to the duty of confidentiality concern claiming outstanding fees (Finland and Romania).

Regarding the aspect of legal professional privilege, it is important to recall that this is a legal concept, in contrast to the duty of confidentiality which is a deontological concept. It is therefore assumed that additional regulations regarding legal professional privilege will be found in procedural regulations. Nevertheless, in the general codes of conduct of 8 Member States (Austria, Croatia, Cyprus, Czech Republic, France, Ireland, Poland, and Slovakia) regulations were identified governing the conduct of lawyers who are confronted with searches and seizure at their premises. Generally, these regulations provide that the lawyer ensures that a representative of the Bar is present during the search. Only the Croatian regulation limits the scope of professional privilege to the material located at the lawyer's office. The Cypriot general code of conduct emphasises that legal professional privilege is a primary right and obligation of the lawyer, which should be respected and safeguarded by the judicial authorities and the Government.

The last aspect of the criminal defence lawyer's role as trusted counsellor concerns the situation in which the lawyer is approached by third parties to take on representation of a client. In the general codes of conduct of 12 Member States (Austria, Belgium (Flanders and Wallonia), Croatia, Cyprus, Denmark, Germany, Ireland (solicitors), Italy, Malta, the Netherlands, Scotland, and Spain), relevant regulations were identified in the general codes of conduct. In 6 of these Member States (Belgium, Germany, Ireland, Italy, the Netherlands and Spain) the regulations permit a lawyer to accept instructions from third parties on behalf of the client explicitly (Belgium, Italy and Ireland) or implicitly (Germany, the Netherlands and Spain). In the first category the regulations prescribe that instructions may only be accepted from third parties under certain conditions (for example, that there should not be a (potential) conflict of interests between the third party and the prospective client and that the client has to give fully informed, voluntary and explicit consent). The second category concerns regulations which refer to the fact that lawyers may accept payment by third parties. It becomes clear from these regulations that the core principles of professional independence and partiality are crucial when deciding on whether or not to accept a case from a third party. The fact that the lawyer's professional independence can easily be compromised when his fees are being paid not by the client himself but by a third party is explicitly mentioned in the general codes of conduct of the Netherlands. Furthermore, by requiring the lawyer to check with the client whether he actually agrees with the representation, the client's right of freedom to choose his lawyer is respected. This benefits the lawyer's duty of partiality and confidentiality towards this client.

In the remaining 6 Member States (Croatia, Cyprus, Denmark, Austria, Malta and Scotland) the regulations identified in the general codes of conduct provide that a lawyer is

only allowed to accept instructions directly from the client, from another lawyer on behalf of the client, or from a public authority or other competent body.

3.5.4 The Criminal Defence Lawyer as Spokesperson

When researching the criminal defence lawyer's role as spokesperson, two aspects were particularly relevant: the lawyer's freedom of defence and his performance in the media. Concerning the latter aspect, specific regulations for criminal defence lawyers have been identified in 4 Member States (Belgium, Croatia, France, and Luxembourg). The regulations are quite diverse. The starting point of the Belgian, French and Luxembourgian regulations is that the criminal defence lawyer should abstain from commenting in the media about pending cases, unless commenting is necessary in the interests of the defence. The Belgian regulations use equality of arms as the basis for the exception: when the authorities or third parties comment in the media about the client's case, the lawyer is also allowed to make comments. The French and Luxembourgian regulations do not elaborate on what is to be considered in the best interests of the defence. Lastly, the Croatian criminal defence lawyer is not allowed to make comments in the media about cases which are still pending.

In addition, the general codes of conduct of at least 12 Member States (Austria, Cyprus, Czech Republic, England and Wales, Finland, Germany, Ireland, Italy, Malta, the Netherlands, Poland, and Slovenia) contain relevant provisions concerning the conduct of lawyers in the media. Only the codes of conduct of Cyprus, Ireland, and Malta prohibit lawyers from communicating with the media about pending cases. Irish lawyers are only allowed to publish copies of pleadings and only with their client's consent, and in Poland legal advisers are not allowed to appear in the media. The codes of conduct of the other Member States allow lawyers to communicate with the media about pending cases, but under the condition that the lawyer obtains the client's prior consent, and that he carefully considers the client's best interests in seeking the media's attention. Some of the regulations stress that the lawyer should avoid any trial by media.

Concerning the aspect of freedom of defence, no specific regulations have been identified in the general codes of conduct. In the general codes of conduct of all Member States, except Austria, Belgium, France, and Romania, relevant general regulations were identified. These regulations cover several features of the lawyer's freedom of defence. First, while some regulations emphasise that the lawyer should be able to effectively defend his client, this does not mean, however, that all conduct is authorised. Namely, and this is the second feature, the lawyer is not allowed to knowingly deceive or mislead the court by providing false or untrue information. Moreover, the lawyer should take the interests of third parties (such as victims and witnesses) into account, and lastly the lawyer has to show respect to the court, for example, by dressing appropriately and by refraining from making any

derogatory or insulting comments about the other participants in the proceedings. These regulations aptly demonstrate the constant balance between the lawyer's duty to act in the client's best interests and his duties to the court and other participants in the proceedings.

4 Recapitulation

The following sub-research question was central to this part of the research:

Which deontological regulations, in particular applicable to criminal defence lawyers, can be identified in the EU Member States?

In this Chapter 3 the deontological regulations governing the conduct of the criminal defence lawyer when exercising his role as legal representative, strategic adviser, trusted counsellor and spokesperson have been mapped out. These deontological regulations were identified in general codes of conduct for the legal profession and in sets of deontological regulations specifically applicable to criminal defence lawyers. In this concluding paragraph an integrated recapitulation will be provided of these findings, by focusing on the way in which the specific sets of regulations complement the relevant regulations identified in the general codes of conduct.

In 4 Member States, specific sets of regulations for criminal defence lawyers were identified, namely in Austria (the Basic Principles),[721] Germany (the Statements),[722] the Netherlands (the Statute),[723] and the United Kingdom (England and Wales (solicitors[724] and barristers[725]) and Scotland (the Code of Conduct for Criminal Work)).[726] Generally, these separate and specific sets of regulations are a further elaboration on the general codes of conduct for lawyers with regard to the application of these general rules on the conduct of criminal defence lawyers who assist and represent suspects and accused persons in criminal proceedings.

In addition to these specific sets of regulations for criminal defence lawyers, specific protocols and sets of regulations on the criminal defence lawyer's conduct prior to and during police interrogation (Salduz Codes) were identified in 4 Member States, namely Belgium, England and Wales, France, and the Netherlands.[727] In these Salduz Codes the

[721] See para. 2.1 of this Chapter.
[722] See para. 2.2 of this Chapter.
[723] See para. 2.3 of this Chapter.
[724] See para. 2.5 of this Chapter.
[725] See para. 2.6 of this Chapter.
[726] See para. 2.8 of this Chapter.
[727] See para. 2.9 of this Chapter.

defence rights of suspects which are applicable to the phase of police custody and more specifically the police interrogation are explicated. Furthermore, these Salduz Codes are quite practice based and provide useful guidance to criminal defence lawyers on how to conduct when providing legal assistance to suspects in police custody.

Lastly, in the general codes of conduct for lawyers of at least 13 Member States one or more relevant regulations were identified governing the conduct of criminal defence lawyers assisting suspects and accused persons in criminal proceedings, namely in Belgium (Flanders and Wallonia), Croatia, Cyprus, Estonia, France, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Slovenia, Sweden, and the United Kingdom (England and Wales – barristers, Ireland – barristers and solicitors, and Scotland – solicitors). There were, however, also some aspects of the role of strategic adviser, which were not covered by deontological regulations, namely advising the accused on his right to silence and the use of interpreters during confidential lawyer-client communications.[728]

The dataset presented in this Chapter 3 consists of a large quantity of detailed and diverse regulations. Therefore, a schematic overview has been made to distinguish at a glance, which aspects of the criminal defence lawyer's roles are regulated in each Member State. The numbers in the overview correspond with the different subparagraphs of this Chapter 3 as follows:

3.1.1	Acceptance of, refusal of and withdrawal from a case in criminal proceedings
3.1.2	*Dominus litis*: who is in charge of the defence
3.1.3	Defending co-accused
3.1.4	Providing publicly funded legal assistance (legal aid)
3.2.1	Advising on the right to silence
3.2.2	Advising on settling the case
3.2.3	Contacting witnesses by the defence
3.2.4	Assistance of an interpreter during lawyer-client meetings
3.2.5	Informing the client on the case
3.3.1	Specific aspects of the duty of confidentiality
3.3.2	Legal professional privilege
3.3.3	Acceptance of cases through third parties
3.4.1	Freedom of defence
3.4.2	The lawyer's performance in the media

[728] See para. 3 of this Chapter.

	3.1.1	3.1.2	3.1.3	3.1.4	3.2.1	3.2.2	3.2.3	3.2.4	3.2.5	3.3.1	3.3.2	3.3.3	3.4.1	3.4.2
Austria	O		S			S	O,S		S		O	O		O,S
Belgium (F)	O		O	O			O		X	EX		O		X
Belgium (W)	O		O	O								O		X
Bulgaria	O		O	O						EX			O	
Croatia	X	X	X				O			EX	O	O	O	X
Cyprus	X		O	O						EX	O	O	O	O
Czech Rep.	O		O	O					O		O		O	O
Denmark	O		O	O			O		O			O	O	
E&W (bar)	O,S		O	S		X	O,S			EX	S		O	O,S
E&W (sol)	O,S		O,S			S	O	S		EX,S			O	S
Estonia	X	X	O			X	O		O	M, EX			O	
Finland	O	O	O				O		O	EX			O	O
France	O		O							M	O			X
Germany	O,S	S	S	O,S		S	S			EX,S	S	O	O,S	O,S
Ireland (bar)	X	X	X,O			X	O			EX	O		O	O
Ireland (sol)	O	O	O	O		X	X			EX	O	O	O	
Italy	X		X				X		O	EX		O	O	O
Latvia	O		O										O	
Lithuania	O	X	O			X				M, EX			O	
Luxembourg	O		O							EX			O	X
Malta	O	X	O				O			EX		O	O	O
Netherlands	O,S	O,S	O	O			X,S		O,S	EX,S	S	S	O,S	O,S
Poland (advo)	O	O	O						O	M	O		O	O
Poland (advs)	O		X											
Romania	O		O							EX				
Scotland (sol)	O,S	X	X,S	S		X,S				EX	S	O,S	O	
Slovakia	O		O				O		O		O		O	
Slovenia	X	O		O						EX			O	O
Spain	O	O	O							EX		O	O	
Sweden	O	O	X	O			O		O	EX			O	

Explanation

X = specific regulation(s) for criminal defence lawyers in general code of conduct
O = relevant general regulations in general code of conduct
S = relevant regulations in specific set of regulations for criminal defence lawyers
M = regulation contains specification of material covered by the duty of confidentiality
EX = regulation contains an explanation of possible exceptions to the duty of confidentiality

It should be noted that regarding the right to silence none of the general codes of conduct contain relevant provisions.[729]

[729] In order to illustrate the importance and challenging character of advising the suspect on his right to silence, the legal practice in England and Wales is explained in para 3.2.1.1 of this Chapter.

4.1 The Criminal Defence Lawyer as Legal Representative

As a general rule, lawyers should only accept a case when they have sufficient experience and expertise, legal competence, and adequate time to handle the matter. It is applicable to all areas of law and can be found in all general codes of conduct across the EU. Additionally, some general codes of conduct provide specific regulations for the acceptance of *criminal* cases, which generally prescribe that a criminal case should be accepted irrespective of the lawyer's personal opinion, the nature of the case, the character of the accused, or the strength of the prosecution's case.[730] The analysis showed a dichotomy between the regulations regarding acceptance of cases by appointed and acceptance of cases by chosen lawyers. Where chosen lawyers are generally free to decide whether they will accept a case, appointed lawyers do not always have this freedom. In Italy and Cyprus, for example, appointed lawyers may only refuse to accept a case if they provide justification, and in Finland an appointed lawyer will have to request permission to withdraw from the authority that has appointed him. The obligation to request permission to withdraw interferes with the criminal defence lawyer's professional independence. Moreover, if permission is denied, the lawyer will have to continue the representation, although it is very likely that at that point the basis of trust in the lawyer-client relationship has disappeared. Under such circumstances, the principles of confidentiality and partiality are very difficult to uphold. The obligation to provide justification of the decision to withdraw from a case or refuse to accept a case, when appointed, could also interfere with the principle of confidentiality, when justification can only be provided by disclosing privilege material.

The Dutch Statute adds another perspective to these general regulations since it explicitly reminds criminal defence lawyers of the possible impact detention has on a suspect's social life, and his emotional and physical well-being. This means that under certain circumstances legal assistance alone might be insufficient; suspects might also need more practical assistance, such as a change of clothes or medical attention. In some situations, when the lawyer is the suspect's only connection to the 'outside' world, the lawyer might be the only person able to provide this kind of assistance. It is important that criminal defence lawyers are aware of their client's precarious position in order to provide the best possible level of legal assistance.[731] Additionally, the importance of accepting a case as soon as possible after a duty call is addressed by the German Statements and the Belgian Salduz Code and the Dutch Protocol and Guidelines for police interrogation.[732]

Quality assurance is an important factor when analysing the effectiveness of criminal defence. The fact that all relevant regulations prescribe that the lawyer is only allowed to

[730] See para. 3.1.1 of this Chapter.
[731] See para. 2.3.1 of this Chapter.
[732] See paras. 2.2 and 2.9 of this Chapter.

accept a case if he knows that he is sufficiently qualified to conduct the case, is actually the only reference made to sufficient quality of legal assistance (in criminal proceedings). None of the regulations explicitly provide a guarantee for the quality of lawyers providing legal assistance in criminal proceedings, such as additional specialist training.[733] By way of illustration and example, England and Wales and the Netherlands were further researched on this matter. In England and Wales several elaborate accreditation schemes are in place to ensure sufficient qualification of legal professionals who assist suspects and accused persons throughout criminal proceedings. There is, for example, an accreditation scheme for police station representatives and a quality assurance scheme for lawyers representing accused persons in court (QASA). Particularly the latter scheme met a lot of criticism from the Law Society and the Bar, which eventually led to QASA not being implemented at all.[734] In the Netherlands, a structured system of quality assurance for lawyers in general has only recently been developed. Quality assessment will be based on structured feedback and includes peer review, structured peer consultations and supervised group discussion.[735] In addition, lawyers who wish to specialise in criminal defence can choose to become member of the Dutch Criminal Bar Association, but only if they meet the admission requirements (member of the Bar for at least five years, a minimum of 500 hours of criminal defence work per year, at least 12 professional training credits in the field of criminal law per year and completion of the specialisation training for criminal defence lawyers). This way quality of the lawyers providing assistance to suspects and accused in criminal proceedings is assured to a certain extent. It has been noted that the lack of quality assurance specifically for criminal defence work could be caused by the fact that specialisation in criminal work is not very common in a number of EU Member States, simply because it is not very lucrative. Most suspects and accused persons are dependent on legal aid funding and lawyers therefore will not be paid large amounts of remuneration for their work, which is often also very time-consuming. Still, monitoring quality of legal services provided by lawyers to suspects and accused in criminal proceedings is crucial to ensure an effective criminal defence.

It has been established in this Chapter 3 that the issue of *dominus litis* is addressed in the general codes of conduct of just a few Member States.[736] The regulations are quite varied. Roughly three views can be distinguished: the lawyer as *dominus litis*, the client as *dominus litis*, or the ethical challenge is recognised without providing a clear stance. It could well be argued that the lawyer's professional beliefs determine how he deals with this ethical challenge. The main question in this regard is: who is best equipped to decide what is in the best interests of the client? The terminology 'best interests' is, however, open to debate.

[733] See para. 3.1.4 of this Chapter.
[734] See para. 2.4.4 of this Chapter.
[735] See para. 3.1.4.2 of this Chapter.
[736] See para. 3.1.2 of this Chapter.

Does this include legal interests as well as personal interests? For example, it might be in the accused's best *legal* interests to plead not guilty and go to trial, but the accused might have his own *personal* interests in pleading guilty because, for instance, he wants to protect his younger brother from having to go to prison. This distinction between legal and factual aspects of the criminal case is recognised in some codes of conduct,[737] by emphasising that the lawyer should base his legal argumentation on facts supplied by the accused. In that view, the lawyer should explain to the accused what his legal position is, so that the accused can make an informed and carefully considered decision about his defence strategy. On the other hand, it could also be argued that the lawyer is most knowledgeable of the legal aspects of the case and criminal proceedings and that the accused has hired the lawyer to assist him, which means that the lawyer should be in charge of the defence strategy. In fact, the lawyer can decide either way, as long as he safeguards the best interests of his client and upholds the core principles of the profession, particularly those of partiality and confidentiality. The codes of conduct of Estonia and Lithuania relate the question of *dominus litis* to the practice of advising on pleading. These codes provide that the lawyer should maintain an 'independent' position from the client when the accused wants to plead guilty, but the lawyer is convinced that his client is innocent based on the evidence in the case. The codes, however, do not provide any further guidance on this matter. It would be interesting to know how this works in practice. Does it not put pressure on the lawyer-client relationship when the lawyer dissociates himself from his client's plea and how should the court deal with this situation? Furthermore, the Austrian Basic Principles[738] and the Dutch Statute[739] are very clear that the accused is the one deciding on the defence strategy and the Dutch Statute adds that the criminal defence lawyer is supposed to withdraw in case of an unsurmountable disagreement between the lawyer and the client about the conduct of the client's case. The other specific sets of regulations do not pay particular attention to the issue of *dominus litis*.

Another aspect of the role of the criminal defence lawyer as legal representative is the representation of co-accused. The analysis of the general codes of conduct shows that the codes are quite unanimous: representation of more than one client in the same case is in itself not prohibited.[740] Representation of co-accused is allowed as long as the lawyer ensures that he is able to still take into account the interests of each individual accused, which means he will have to uphold the principle of partiality as well as the principle of confidentiality with regard to each accused. It is imaginable that this becomes more difficult when a (potential) conflict of interests between the accused persons exists or arises during the course of representation. An important question in this respect is who should decide

[737] See para. 3.1.2.1 of this Chapter.
[738] See para. 2.1 of this Chapter.
[739] See para. 2.3.1 of this Chapter.
[740] See para. 3.1.3 of this Chapter.

whether a conflict of interests exists. The Dutch Statute and English Practice Notes emphasise that it is the criminal defence lawyer's responsibility to determine whether there is (potentially) a conflict of interests, which means that the lawyer will have to be granted early access to all detained suspects in the case.[741] Only the Scottish Code for Criminal Work and the Belgium Salduz Code explicitly advise criminal defence lawyers not to represent more than one client in the same case.[742] According to these codes, conflicts of interests are very likely to arise and cause irreparable breaches of confidentiality. The Austrian Basic Principles, German Statements, Dutch Statute and English Practice Notes furthermore provide that the criminal defence lawyer will have to obtain written and informed consent from all accused involved and that he will have to withdraw from all cases as soon as a conflict of interests arises between the co-accused. It has been pointed out that the latter might be an incentive for criminal defence lawyers not to represent co-accused in the first place, because they run the risk of losing substantial income when they have to withdraw from all cases.

4.2 The Criminal Defence Lawyer as Strategic Adviser

One of the key elements of the criminal defence lawyer's role as strategic adviser is the constant balance between the interests of the client and the interests of the criminal investigation. The Dutch Statute prescribes that the accused's interests should always prevail the interests of the criminal investigations.[743] The Austrian Basic Principles, Dutch Statute, and German Statements provide that it is the criminal defence lawyer's duty to properly advise the accused about the best possible defence strategy, by explaining all possible options and the consequences of certain defence strategies so that the client can autonomously decide on the defence strategy.[744] The most prominent issue in this regard is that the defence needs information about the prosecution's case as soon as possible in order to determine the best defence strategy. Advising the suspect in the absence of sufficient information is difficult, if not impossible. Only the Belgian and the French Salduz Code specifically refer to this issue by stressing that the criminal defence lawyer should be granted full access to case materials as soon as possible.[745]

Information is not only gathered through prosecution disclosure, it is also gathered by contacting and interviewing witnesses pre-trial. This is another aspect of the criminal defence lawyer's role as strategic adviser which has been analysed in this Chapter 3.[746] In addition to

[741] See paras. 2.3.1 and 2.5.3 of this Chapter.
[742] See paras. 2.8 and 2.9.1 of this Chapter.
[743] See para. 2.3.1 of this Chapter.
[744] See paras. 2.1, 2.3.1 and 2.2 of this Chapter.
[745] See paras. 2.9.1 and 2.9.2 of this Chapter.
[746] See para. 3.2.3 of this Chapter.

the relevant regulations identified in the general codes of conduct, all specific sets of regulations recognise the right of the criminal defence lawyer and accused to contact and interview witnesses pre-trial. The Austrian Basic Principles provide that the lawyer should never let himself be forced by the suspect or accused person to follow a certain line of inquiry, and he always should maintain full responsibility and independence in this matter.[747] The Dutch Statute emphasises the importance of the defence's right to contact and hear witnesses pre-trial in light of the principle of equality of arms.[748] The English Practice Note on defence witness notices underlines the longstanding tradition of solicitors interviewing and taking statements from witnesses pre-trial in order to advise the accused properly on whether or not to call a witness to testify in court.[749] English barristers are also allowed to contact witnesses, but this contact is limited to preparing the witness for the experience of giving evidence in court.[750] Lastly, the Scottish Code of Conduct for Criminal Work prescribes that the solicitor is obliged to collect all relevant information and evidence to support the accused's case, including interviewing witnesses. Also the Scottish Code of Conduct, just like the Austrian Basic Principles, emphasises the criminal defence lawyer's independent responsibility to decide which witnesses will be heard and which statements will be used in evidence to support the case for the defence.[751]

Advising on the defence strategy includes advising on out-of-court settlements, such as plea bargaining, and invoking the right to silence. Regulations regarding advising the accused on his right to silence were not identified in any of the regulations under review.[752]

Regulations regarding advising on plea bargaining or other out-of-court settlement proceedings have been identified in the general codes of conduct of several EU Member States.[753] Also in the English Practice Notes for solicitors, the Scottish Code of Conduct for Criminal Work, the German Statements, and the Austrian Basic Principles plea bargaining and out-of-court settlement are addressed.[754] In England and Wales, the Law Society issued an elaborate Practice Note regarding advising on pleading. Much attention is paid to the common situation in which the defence does not have sufficient information about the prosecution's case yet. Criminal defence lawyers are advised to inform the authorities of the predicament the accused is in: lack of early prosecution disclosure makes a well-informed decision regarding pleading impossible. Open and timely communication about the accused's situation should prevent the court from holding the accused responsible for a late

[747] See para. 2.1 of this Chapter.
[748] See para. 2.3.2 of this Chapter.
[749] See para. 2.5.5 of this Chapter.
[750] See para. 2.6.4 of this Chapter.
[751] See para. 2.8 of this Chapter.
[752] See para. 3.2.1 of this Chapter.
[753] See para. 3.2.2 of this Chapter.
[754] See paras. 2.5.2, 2.8, 2.2, and 2.1 of this Chapter respectively.

plea of guilty due to lack of (timely) prosecution disclosure. However, the criminal defence lawyer will have to constantly review his advice to the accused, depending on the level of prosecution disclosure. Moreover, lawyers are urged to never put pressure on the accused to plead guilty and never advise a plea of guilty unless they are satisfied that the prosecution can actually prove the charges. The Austrian criminal justice system also knows out-of-court settlement and the Austrian Basic Principles actually explicitly mention the criminal defence lawyer's duty to actively explore and pursue all possibilities of settling the case out of court, as long as the accused consents. The German Statements remind the criminal defence lawyer that settlement proceedings do not only have advantages for the accused, but also some significant risks. It is the lawyer's duty to fully inform his client of all the pros and cons of the settlement. Despite the fact that out-of-court settlement proceedings are also not unknown to the Dutch criminal justice system, the Dutch Statute does not address this particular phase of proceedings. This is a lacuna which does not contribute to an effective criminal defence, particularly since criminal cases are increasingly dealt with in the pre-trial phase through out-of-court settlement procedures.

Another aspect of the criminal defence lawyer's role as strategic adviser which was analysed in this Chapter 3 concerns the lawyer's responsibility to ensure that an interpreter is consulted when lawyer-client communication is difficult due to language barriers. The general codes of conduct do not provide any regulations on this matter.[755] Relevant regulations were only identified in England and Wales. According to the Law Society's Practice Note on the use of interpreters in criminal cases, police station interpreters can, in principle, be asked to assist lawyer-client communication at the police station. It is, however, the lawyer's responsibility to ensure that the confidential character of lawyer-client communication is safeguarded, which might mean that a different interpreter will have to be requested to assist during lawyer-client communication.[756]

Keeping the accused informed about the case was the last aspect of the criminal defence lawyer's role as strategic adviser under review.[757] Regulations on keeping the client informed range from providing the client copies of all or certain parts of the case file to answering the client's questions and the duty to keep the client informed about the progress of the case. Since determining the defence strategy is ideally the result of a close cooperation between the lawyer and the accused, it is important that the lawyer keeps the accused informed about the progress of his case.

[755] See para. 3.2.4 of this Chapter.
[756] See para. 2.5.8 of this Chapter.
[757] See para. 3.2.5 of this Chapter.

4.3 The Criminal Defence Lawyer as Trusted Counsellor

The starting point of the analysis of the role of the criminal defence lawyer as trusted counsellor of the accused in this Chapter 3 has been that this role is determined by the lawyer's duty of confidentiality as well as the legal concept of professional privilege. The duty of confidentiality is paramount to building an effective working relationship based on mutual trust with the accused. Consequently, this duty is recognised in the general codes of conduct of all Member States and also in the five specific sets of regulations for criminal defence lawyers. The duty of confidentiality only covers information that comes to the lawyer's knowledge when practising his profession. This is further specified in some of the general codes of conduct.[758] Information covered by confidentiality includes, for example, the fact that the accused has contacted the lawyer with a request for legal assistance, the information and data provided by the client in the course of the proceedings and information gathered by the lawyer at the accused's request. In addition to the more common regulations, the specific Salduz protocols emphasise the suspect's right to privately confer with a lawyer prior to the police interrogation. Moreover, all specific sets of regulations prescribe that the lawyer is only allowed to publish and communicate confidential information with the client's prior and explicit consent. The Dutch Statute also stresses the lawyer's own responsibility in deciding whether information will be communicated to third parties. The accused's interests should always be leading.

The legal concept of professional privilege is not a typical subject to be dealt with in codes of conduct, since it is primarily a procedural matter, rather than a general deontological issue. Nevertheless, in some Member States relevant regulations were identified in the general codes of conduct.[759] The rationale behind these regulations is the protection of confidentiality and professional independence, which is guaranteed by requiring the presence of a Bar representative during the search and seizure at a lawyer's premises. Only the Cypriot code of conduct explicitly refers to the State's responsibility to respect the lawyer's professional privilege. The specific sets of regulations do not explicitly refer to the criminal defence lawyer's conduct in this regard. The Dutch and English Bar Associations, however, have issued separate guidance for lawyers and barristers regarding their conduct during searches of their premises.[760] This guidance is very detailed and practice-based, providing extensive guidance to the lawyer during all phases of the search. The rationale behind both sets of regulations is to safeguard the privileged character of seized material.

[758] See para. 3.3.1 of this Chapter.
[759] See para. 3.3.2 of this Chapter.
[760] See paras. 2.3.2 and 2.6.6 of this Chapter.

Additionally, the Dutch Bar Association has issued specific regulations relating to safeguarding confidential lawyer-client communication via telephone.[761]

The last aspect of the criminal defence lawyer's role as trusted counsellor concerns the situation in which criminal defence lawyers are approached by a third party, for example a friend or relative of the accused, to represent or take over the representation of a certain accused. In a few Member States relevant regulations were identified in the general codes of conduct. These regulations have in common that the principle of partiality is honoured by requiring that the lawyer may only accept instructions or payment from third parties with the client's informed and explicit consent. There are also some Member States which do not allow lawyers to accept payment or instructions from third parties because this would violate the client's freedom to choose his own counsel and would jeopardise the lawyer's principle of partiality towards the client.[762] Additionally, only the Dutch Statute and the Scottish Code of Conduct for criminal work address this aspect.[763] Both sets of regulations allow the criminal defence lawyer to accept instructions and payment from third parties on behalf of the accused. Yet, they also stress that the criminal defence lawyer has to ensure that he maintains his professional independence and upholds his duty of confidentiality towards the accused. This means, for example, that the lawyer himself will always have to check with the accused whether the accused wants to be represented by him and that he should never agree to accept payment from a third party in exchange for sharing confidential information with this party.

4.4 The Criminal Defence Lawyer as Spokesperson

With regard to the criminal defence lawyer's role as spokesperson, two aspects were analysed in this Chapter, namely the lawyer's performance in court and his performance in the media. To start with the latter, only a few Member States provide in their general codes of conduct a prohibition on lawyers communicating with the media about a pending case.[764] However, all relevant regulations stress that the lawyer has to keep in mind the client's interests at all times, so that information can only be shared with the media if this is in the best interests of the accused. In the German Statements,[765] the English Practice Notes for

[761] See para. 2.3.2 of this Chapter.
[762] See para. 3.3.3 of this Chapter.
[763] See paras. 2.3.2 and 2.8 of this Chapter.
[764] See para. 3.4.2 of this Chapter.
[765] See para. 2.2 of this Chapter.

solicitors[766] and Ethical guidance for barristers,[767] and the Dutch Statute,[768] regulations were identified that did not explicitly prohibit the lawyer from contacting the media, although both sets of regulations underlined the importance of avoiding trial by media. In particular in England and Wales where criminal trials in Crown Court are decided by juries, media attention could easily undermine the effectiveness of proceedings. The Austrian Basic Principles are unique in promoting media contact as a defence strategy, specifically in high-profile criminal cases.[769] All regulations underline the importance of conferring with the client about sharing confidential information with the media and this can never be done without the client's prior consent. It is also the lawyer's responsibility to carefully weigh all the interests involved when commenting in the media; this not only includes the interests of the accused, but also the interests of witnesses and victims. Lastly, the German, Dutch and English regulations pay particular attention to the fact that the lawyer needs to be sure that he keeps control over the information that is shared with the media as much as possible. In that regard, written media is easier to control than, for example, television or radio broadcasts and social media.

Regarding the lawyer's conduct in court, most Member States provide regulations in the general codes of conduct governing how the lawyer is supposed to behave in court.[770] The main aspect is that the lawyer is not allowed to knowingly deceive or mislead the court by providing false or incorrect information. The Dutch Statute addresses this aspect of the criminal defence lawyer's role as spokesperson by stipulating that nothing said by the defence lawyer should be held against the accused. This way, the lawyer can feel free to utilise the full range of his freedom of defence, of course within the limitations that are also set by the general rules of conduct: he is still not allowed to knowingly deceive the court or make unfounded allegations against third parties or cause unnecessary harm to others.[771] The German Statements generally refer to the lawyer's freedom to defend his client effectively in criminal proceedings by stating that this freedom is only limited by professional ethics in order to form a sufficient counterweight to far-reaching investigative measures.[772]

[766] See para. 2.5.10 of this Chapter.
[767] See para. 2.6.3 of this Chapter.
[768] See para. 2.3.1 of this Chapter.
[769] See para. 2.1 of this Chapter.
[770] See para. 3.4.1 of this Chapter.
[771] See para. 2.3.2 of this Chapter.
[772] See para. 2.2 of this Chapter.

CHAPTER 4
Synthesis and Analysis

1 Introduction

In her inaugural lecture in 2003, Spronken expressed her concern about the fact that the regulations regarding criminal defence lawyers did not seem to be keeping pace with the rapid changes in the field of cross-border cooperation in criminal matters within the EU.[1] Much has changed since 2003. Security is still high on the EU's policy agenda[2] and cross-border cooperation between judicial authorities in the field of crime control is ever expanding with, for example, the European Arrest Warrant in 2004,[3] the European Evidence Warrant in 2008,[4] and the European Investigation Order in 2014.[5] Furthermore, in 2017 the European Public Prosecutor's Office was installed.[6] In the meantime also some important measures have been adopted safeguarding the rights of suspects and accused persons in criminal proceedings, such as EU Directive 2013/48[7] on the rights of suspects and accused persons to legal assistance.[8] Moreover, the Parliamentary Assembly of the Council of Europe

[1] Spronken 2003, p. 1.
[2] Survey conducted by the TNS Opinion and Social at the request of the European Commission, "Europeans' attitudes towards security", Special Eurobarometer 464b, December 2017.
[3] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190/1 (18 July 2002).
[4] Council Framework Decision of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (2008/978/JHA), OJ L 350/72 (30 December 2008), this framework decision is no longer in force since 21 February 2016 because its scope was too limited.
[5] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. This Directive replaced the European Evidence Warrant.
[6] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), OJ L 283/1 (31 October 2017).
[7] Directive 2013/48/EU, OJ L (2013) L 294/1.
[8] Other relevant EU Directives are: Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 *on the right to interpretation and translation in criminal proceedings* (OJ L (2010) 280/1); Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 *on the right to information in criminal proceedings* (OJ L (2012) 142/1); Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings* (OJ L (2016) 297/1); Directive 2016/800/EU of the European Parliament and the Council of 11 May 2016 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings* (OJ L (2016) 132/1).

filed a motion inviting the Committee of Ministers to initiate work on drafting a European Convention on the profession of lawyer.[9]

This research fits in seamlessly with these developments by focusing on the role and position of the criminal defence lawyer in cross-border criminal defence, more specifically on *the conduct of criminal defence lawyers.* As such, this research focuses on the deontological regulations, existing across the EU, which govern the conduct of criminal defence lawyers when assisting suspects and accused persons in criminal proceedings. In this Chapter 4 the research results which were mapped out and explained in Chapter 3 are analysed by testing them against the normative framework as mapped out in Chapter 2. This will provide an answer to the last sub-research questions:

What are the differences and similarities between the regulations as identified across the EU? What can be concluded about the compatibility of these regulations with the normative framework?

1.1 Plan of Discussion

The next four paragraphs address the role of the criminal defence lawyer as legal representative, strategic adviser, trusted counsellor and spokesperson respectively and all paragraphs follow the same structure. Each paragraph starts with a short recapitulation of the normative framework as set out in Chapter 2, followed by an outline of regulations in common and those that differ, as discussed in Chapter 3. For ease of reference, the relevant paragraphs from the previous Chapters are footnoted. Each paragraph concludes with an analysis of the regulations identified by testing them against the normative framework.

2 The Criminal Defence Lawyer as Legal Representative

Legal assistance is one of the cornerstones of the right to a fair trial. Without proper legal assistance, it is more likely that the accused will neither be fully informed of nor be able to effectively exercise his defence rights. It should be noted, however, that the criminal defence lawyer not only has an important role in providing legal assistance; he also has to be able to offer social and psychological support to the accused.

[9] Parliamentary Assembly of the Council of Europe, Doc. 14181 Motion for a recommendation "The case for drafting a European Convention on the profession of lawyer" (13 October 2016). This motion was signed by 22 members of the Parliamentary Assembly (Armenia, Austria, Azerbaijan, Estonia, France, Georgia, Germany, Latvia, Luxembourg, Norway, Spain, Switzerland and Ukraine). See also Recommendation 2085 (2016) and Recommendation 2121 (2018) of the Parliamentary Assembly.

Deontological questions which may arise when the criminal defence lawyer acts as a legal representative are for example, is the criminal defence lawyer obliged to accept instructions in any case? Who is considered in charge of the defence? Is a criminal defence lawyer allowed to represent more than one accused in the same case (representation of co-accused)? What, if any, are the regulations concerning the criminal defence lawyer's conduct in the pre-trial phase?

2.1 Recapitulation of the Normative Framework[10]

The right to legal assistance is laid down in Article 6 § 3 ECHR, Article 47 (second and third paragraphs) EU Charter, Article 48 § 2 EU Charter and Articles 3 and 9 EU Directive 2013/48. The following aspects of the right to legal assistance have been included in the normative framework: the accused's right to self-representation (including the right to choose a lawyer), the right to legal assistance during the pre-trial or investigative phase (particularly prior to and during police interrogation) and the right to legal aid.

Firstly, the right to legal assistance and the right to defend oneself are not absolute. Exceptions are bound to strict conditions, should always serve the best interests of the defence, and may not render the right to legal assistance illusory. Waiver of the right to legal assistance is only valid when it is done voluntarily, explicitly and unequivocally. Moreover, every time the accused is confronted with a new situation in which he would be entitled to legal assistance, he has to be informed of this right so that he can deliberate whether he wants to have legal assistance from that point on in proceedings. If the accused decides that he wants to have legal representation, he has the right to choose his own lawyer. This freedom of choice of counsel is fundamental to the confidential lawyer-client relationship. The ECtHR attaches great value to this right to freely choose a lawyer, even though this right is also not absolute. Compulsory appointment of a duty lawyer is allowed if it is proportionate in relation to the pursuit of an effective and expeditious criminal process.

Secondly, an accused has to be able to obtain the whole range of legal services. This implies that the criminal defence lawyer has to ensure that he can discuss the case with his client, that he properly organises the defence, that he collects evidence favourable to the accused's case, that he deliberates with his client before police interrogation, that he supports his client in distress, and that he checks the conditions of the accused's detention. Legal assistance during the pre-trial phase is crucial since it is commonly acknowledged that consequences, some of which can be far-reaching, may be attached to the accused's position and attitude during this initial phase in criminal proceedings. Moreover, the ECtHR underlines the particularly vulnerable position of the accused during this pre-trial phase and the fact

[10] See Chapter 2, para. 2.1.

that the criminal defence lawyer has a vital role in counterbalancing this vulnerability. In this phase, the defence lawyer also has an important responsibility to help protect the accused's right to silence and his privilege against self-incrimination. This is why the defence lawyer's presence and active participation during police interrogation is essential for safeguarding these rights. According to the ECtHR, not having a lawyer present during interrogation does not automatically exclude statements from evidence made by the accused in the absence of his lawyer. Several factors will have to be taken into account before deciding to exclude statements from evidence, such as whether there were compelling reasons to deny the lawyer access to the interrogation. If there were no compelling reasons, statements will only be excluded if there were specific circumstances which would justify exclusion of the statements (for example, the vulnerability of the accused or doubtful circumstances in which the evidence was obtained).

Thirdly, EU Directive 2016/1919 on legal aid urges Member States to ensure that an effective legal aid system is in place. Since criminal defence is often provided on the basis of legal aid, this Directive is important for criminal defence lawyers. According to the Directive, the legal aid system should be of adequate quality, which includes the level of legal aid services provided. The State clearly has a responsibility in ensuring a sufficient level of quality of legal aid providers; merely nominating a lawyer does not in itself ensure effective legal assistance. On the other hand, the Directive also emphasises that the independence of the legal profession should be respected by the State. According to standing ECtHR case law, interference from the State is only allowed when it is has become clear that the criminal defence lawyer is not properly executing his tasks.

In order to be able to meet the criteria mentioned above, the lawyer will have to act in the best interests of his client. The principle of partiality therefore plays an important role. By behaving as a partisan legal representative, the lawyer forces the other participants in the proceedings to respect his position as legal representative of his client's interests. The principle of partiality also prevents the criminal defence lawyer from acting for co-accused who have conflicting interests. At the same time, since partiality could easily lead to the criminal defence lawyer acting as the accused's mouthpiece, it has to be clearly delineated by the principle of professional independence: the criminal defence lawyer needs to remain professionally independent, also from his own client. The criminal defence lawyer always has an independent responsibility in upholding societal trust not only in him but also in the legal profession as a whole. At the same time, professional independence is paramount when conducting an effective defence because it enables the criminal defence lawyer to fully focus on the interests of his client.

2.2 Regulations in Common

2.2.1 Acceptance and Refusal of and Withdrawal from (Criminal) Cases[11]

All Member States provide regulations in the general codes of conduct that oblige lawyers to only accept a case when they are sufficiently qualified and knowledgeable and able on a practical level to handle that case. Moreover, acceptance of a case is not recommended when this would lead to a breach of confidentiality towards other clients or if it would compromise the lawyer's professional independence. Furthermore, most general codes of conduct oblige lawyers to keep their legal knowledge and expertise up to date by continuing professional development. Lastly, with regard to withdrawal from a case, all regulations emphasise that the lawyer has to carefully consider the consequences of his withdrawal and that he should keep the negative effects for the client to a minimum.

In addition to these general regulations, 6 Member States[12] provide specific regulations in their general codes of conduct concerning acceptance of instructions in criminal cases. These regulations in general prescribe that criminal cases should be accepted regardless of public opinion, their personal opinion, the person of the accused, the nature of the offence, whether the accused pleaded guilty or the strength of the prosecution's case.

Lastly, when considering the issue of withdrawal from a case, all specific sets of regulations as identified in Austria, Germany, England and Wales, the Netherlands and Scotland emphasise that criminal defence lawyers have to ensure that their withdrawal has no negative effects to the accused's defence position.

2.2.2 Providing Legal Aid to Accused[13] *and Quality Assurance of Legal Aid Providers*[14]

In the general codes of conduct of 10 Member States,[15] relevant general regulations were identified concerning the provision of legal assistance on the basis of legal aid. These regulations have in common that they refer to the lawyer's duty to inform the client of the possibility of legal aid. None of the regulations oblige the lawyer to apply for legal aid. There are, however, also some differences. For example, the Estonian, Swedish and Dutch regulations explicitly prescribe that the lawyer is not allowed to accept additional fees from clients who are being assisted on the basis of legal aid, while the German regulations allow lawyers to accept additional fees from clients who receive legal aid. These fees can be paid

[11] See Chapter 3, para. 3.1.1.
[12] Croatia, Cyprus, Estonia, Ireland, Italy, and Slovenia.
[13] See Chapter 3, para. 3.1.4.
[14] See Chapter 3, para. 3.1.4.1.
[15] Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Ireland, the Netherlands, Slovenia, and Sweden.

by the client or on the client's behalf by third parties, but may only be accepted by the lawyer if the payments are made voluntarily and after the client or third party has been properly informed by the lawyer that he has no obligation to pay additional fees.

None of the codes of conduct under review contain regulations referring to quality assurance. Still, monitoring the quality of legal professionals in general and of legal aid providers in particular is important for the legal profession as a whole, to uphold societal trust. Moreover, EU law imposes an obligation on States to ensure adequate quality of legal aid. Since criminal cases often fall within the ambit of the criminal legal aid scheme, it is important that there is a sufficient framework for criminal defence lawyers to ensure that they deliver adequate quality of legal aid. By way of illustration, the quality assurance mechanisms in England and Wales and the Netherlands were described in this research.

England and Wales have a sophisticated system of quality control, consisting of quality marks, criminal litigation accreditation schemes, audits and official investigations. Law firm practices and sole practitioners who are accredited based on the Lexcel quality mark have proven to excel in practice management and client care. Practitioners who wish to carry out criminal law work and be included in the duty rosters have to be accredited under the criminal litigation scheme. In order to obtain accreditation, practitioners have to complete the Police Station Qualification or Police Station Representative Scheme and the Magistrates' Court Qualification. The Legal Aid Agency also organises random audits and official investigations to assess the quality standards of legal aid providers by inspecting records of contract work.

The quality assurance schemes in the Netherlands concern requirements of registering with the Legal Aid Board, completing quality tests developed by the Dutch Bar Association and attending non-committal meetings for lawyers organised by the Legal Aid Board. Lawyers who wish to provide legal aid and be included in the duty rosters have to meet certain admission criteria in order to be registered with the Legal Aid Board. Fulfilment of these criteria ensures a certain level of professional competence in criminal advocacy. Moreover, the Dutch Bar Association has developed quality tests, which have yet to be implemented. These tests include peer review and structured and supervised discussions between peers. Lastly, the Dutch Legal Aid Board organises meetings for lawyers to exchange practical experiences in particular areas of law. This should enhance the quality of legal aid. Compared to the quality assurance mechanisms in England and Wales, the Dutch mechanisms are primarily based on voluntary commitment of individual lawyers. The English quality control schemes on the other hand are more obligatory and demanding.

2.2.3 Representation of Suspects at the Police Station, particularly during Police Interrogation[16]

Throughout the EU more and more emphasis is being put on the pre-trial phase of criminal proceedings. This means that the criminal defence lawyer's role and position pre-trial is also becoming increasingly important. With the entry into force of EU Directive 2013/48, in particular the criminal defence lawyer's role prior to and during police interrogation has been strengthened. Apart from some general comments in recital 25 of this EU Directive, not much attention is paid to guidelines for criminal defence lawyers on their conduct in this particular phase of criminal proceedings.

Specific regulations concerning the representation of suspects at the police station were identified in at least 4 Member States (England and Wales, France, Belgium, and the Netherlands). Although the criminal justice systems in these Member States show many differences, the regulations concerning representation of suspects in the police station show many similarities.

All these regulations refer to the accused's right to confidential communication with the lawyer prior to police interrogation. The Dutch and French regulations limit the time to confidential lawyer-client communication prior to the interrogation to 30 minutes. Moreover, the regulations all prescribe that the lawyer should adopt an active and dynamic attitude during police interrogation. Other issues which are regulated concern the fact that the lawyer should respond to a call for assistance as soon as possible (Belgium and the Netherlands), should check the written record of the police interrogation (Belgium and the Netherlands), and should advise the suspect never to sign the record (Belgium). Furthermore, the issue of sufficient and timely prosecution disclosure is addressed in the Belgian and French regulations. According to these regulations, the lawyer should advise the suspect to invoke silence as long as no information on the case file is shared with the defence, and according to the French regulation, the defence should have unlimited access to the case file during the period of police custody. The lack of prosecution disclosure in this phase of proceedings is also referred to in the Belgian regulations as a reason to advise the lawyer not to take on representation for more than one suspect in the same case. According to these regulations it will be difficult for the lawyer to establish whether there is a (potential) conflict of interests between the suspects if the lawyer has only scant knowledge of the case file. In addition to practical guidelines to lawyers assisting suspects in police custody, the English and Dutch regulations further clarify the criminal defence lawyer's role and position by emphasising his independent and partial position as the suspect's defender, trusted counsellor and legal adviser.

[16] See Chapter 3, para. 2.9.

2.3 Differences in Regulations

2.3.1 Acceptance and Refusal of and Withdrawal from an (Appointed) Case[17]

Although the general codes of conduct show commonalities regarding the acceptance and refusal of and withdrawal from cases in general, there are also some differences in regulations. In some general codes of conduct a distinction is made between chosen and appointed lawyers regarding the issue of acceptance and refusal of and withdrawal from cases. In Italy and Cyprus, an appointed lawyer is only allowed to withdraw from an appointed case with permission of the authority that appointed him and provided that the lawyer gives justification for the withdrawal. In Estonia, the lawyer is obliged to accept the case when he is appointed. Refusal of appointed cases is also not unconditional in the Czech Republic, Finland and Poland. Other general codes of conduct[18] do not make such a distinction. Most of the regulations provide that the lawyer is free to decide whether or not to accept a case. Only Lithuania and Denmark show a different approach. In Lithuania, lawyers are only allowed to refuse a case if there is an important reason for refusal. The code of conduct does not further elaborate on which reasons are considered as important. Danish lawyers are urged to only accept a case when instructions come directly from the client.

In addition to the regulations identified in the general codes of conduct, the Dutch Statute for criminal defence lawyers[19] and the German Statements on criminal defence[20] urge lawyers to respond to requests for accepting a case as soon as possible. This is particularly relevant in the investigative phase when suspects are confronted with investigational measures and need legal advice and assistance as soon as possible. Moreover, the Dutch Statute reminds lawyers of the fact that clients at the early stages of proceedings are particularly vulnerable and might need not only legal assistance, but also practical and social support. The German Statements on criminal defence state that the lawyer should refuse to be appointed if it is clear to the lawyer that the accused does not want to be represented (by him). Lastly, according to the English cab rank rule,[21] barristers are obliged to accept instructions irrespective of their opinion of the case or the client. This cab rank rule works in two ways: it ensures that all clients are able to instruct the best qualified barrister available and it protects barristers from unfavourable public opinion. At the same time, fundamental changes in the composition of the legal service market have put the cab rank rule under

[17] See Chapter 3, para. 3.1.1.
[18] Denmark, England and Wales, Latvia, Lithuania, Malta, the Netherlands, Scotland, Spain, and Sweden.
[19] See Chapter 3, para. 2.3.1.
[20] See Chapter 3, para. 2.2.
[21] See Chapter 3, para. 2.6.1.

pressure. Due to the fact that barristers are no longer the only legal profession qualified to represent accused persons in court, the need for the cab rank rule has become questionable.

2.3.2 Defending Co-Accused[22]

In the rules of conduct identified regarding the defence of co-accused in the same matter by the same lawyer, a distinction was found between representation of co-accused with (potentially) conflicting interests and of co-accused without conflicting interests. None of the general codes of conduct explicitly prohibit representation of more than one client in the same case. However, all general codes of conduct do prescribe that the lawyer should avoid any conflict of interests. Generally, there is a conflict of interests between the clients if the lawyer were to be inclined to give different legal advice to each client.

More detailed regulations regarding the representation of more than one client in the same case were identified in the general codes of conduct of 19 Member States.[23] These regulations can roughly be divided into two categories. First, the majority of these regulations prohibit lawyers from representing more than one client in the same case if the interests of those clients (potentially) conflict. Second, there are regulations which allow lawyers to represent more than one client in the same case, regardless of whether there is a conflict of interests. According to these regulations, the lawyer has an increased responsibility to carefully explain the risks and consequences of a joint defence to the clients and obtain prior and written consent from all clients involved. For example, defending co-accused can be in the interests of all accused involved, since the defence can be better coordinated. Such advantages can, however, only be enjoyed when the accused are not hierarchically dependent on each other and are each able to decide on the defence strategy. This means that the lawyer representing the co-accused has to ensure that he understands the mutual relationships between the accused.

In addition to these general regulations, more specific regulations for the defence of co-accused in criminal matters were identified in the general codes of conduct of 4 Member States (Croatia, Ireland (barristers), Scotland, and Sweden). Only the Scottish regulations take as a starting point that a lawyer should not accept instructions to act for more than one accused in the same case, except in very exceptional circumstances. These regulations do not elaborate on what could be considered a very exceptional circumstance. The other three regulations prescribe that lawyers are not allowed to represent more than one accused in the same case if there is a (potential) conflict of interests.

---

[22] Chapter 3, para. 3.1.3.

[23] Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, and Spain.

Lastly, the specific sets of regulations for criminal defence lawyers of the Netherlands and England and Wales add to the already mentioned regulations that the criminal defence lawyer has to be aware of the fact that he is the one deciding whether there is a (potential) conflict of client interests. He is only able to do so when he has had the opportunity to confer with all accused involved. This means that the lawyer should always be granted access to all accused and insist on being granted access if this is not allowed at first. Only the Scottish Code of Conduct for criminal work[24] and the Belgian *Salduz* Code[25] explicitly advise criminal defence lawyers not to take on the defence of more than one accused in the same case because conflicts of interests and breaches of confidentiality are inevitable in these circumstances. The German Statements on criminal defence[26] refer to the possibility of a joint and coordinated defence of co-accused by multiple lawyers, which allows for a more nuanced approach to the interests of each individual client.

2.3.3 Dominus Litis[27]

Relevant general regulations were identified in the general codes of conduct of 7 Member States (Finland, Ireland (solicitors), the Netherlands, Poland, Slovenia, Spain, and Sweden). The Dutch, Finnish, Irish, Polish, and Spanish regulations emphasise the client's strong position regarding making final decisions on the defence strategy. In all these regulations the lawyer is primarily presented as the client's legal adviser to enable the client to make an informed decision about his defence strategy. Some of the regulations (the Netherlands and Poland) explicitly provide that the lawyer should withdraw from the case when there is disagreement about the defence strategy between the lawyer and the client. The Swedish regulations primarily emphasise the lawyer's independent position towards the client and his duty to provide the client with impartial and solid legal advice.

In addition, the general codes of conduct of 6 Member States (Croatia, Estonia, Ireland (barristers), Lithuania, Malta, and Scotland) provide specific regulations for criminal defence lawyers regarding the subject of *dominus litis*. The Croatian and Estonian regulations make a distinction between factual and legal matters; the client is in charge of the former, while the lawyer is in charge of the latter. A Lithuanian criminal defence lawyer may choose a certain defence strategy only after having consulted with the client and taking due regard of the client's arguments and reasoning. The Maltese regulations portray the criminal defence lawyer primarily as spokesperson for the accused, since the accused himself often lacks sufficient skill, knowledge and legal training. According to the Irish regulations, the lawyer

[24] See Chapter 3, para. 2.8.
[25] See Chapter 3, para. 2.9.1.
[26] See Chapter 3, para. 2.2.
[27] See Chapter 3, para. 3.1.2.

only advises the accused with regard to giving evidence, but the accused always makes the final decision.

2.3.4 Prohibition of Lawyer-Client Contact[28]

Lastly, a typically Dutch regulation should be mentioned here, because it affects lawyer-client communication and therefore potentially has a serious impact on the criminal defence lawyer's role as legal representative, in particular his ability to prepare the defence strategy. According to the Dutch Code of Criminal Procedure, the prosecution has the possibility – in highly exceptional circumstances – to impose a temporary order prohibiting all contact between the lawyer and his client when there are serious suspicions of abuse of free and unsupervised lawyer-client communication. Such an order is always under judicial review and a substitute lawyer is immediately appointed by the court to assist the accused. Notwithstanding these procedural safeguards, it could be argued that in practice the appointment of a substitute lawyer will not be very effective. He will have to acquaint himself with the case file and the original lawyer will often not be able to immediately seize his assistance, particularly when immediate action is required in the interests of the defence. He will, however, not be able to confer with the accused. The drafters of the Dutch Statute for criminal defence lawyers therefore argue that disciplining criminal defence lawyers who abuse their professional privilege should be left to the profession itself through disciplinary tribunals and supervision by the Bar presidents. Standing disciplinary case law shows that such supervision should be effective since the legal profession is keen on upholding professional privilege and maintaining societal trust, so that any abuse is quite strictly and severely disciplined.

2.4 Synthesis

The deontological regulations which were identified concerning the acceptance of cases, particularly acceptance of *criminal law* cases, underline the importance of legal representation in criminal cases by preventing accused persons from being deprived of legal assistance due to, for example, the nature of the offence or a negative public opinion. These regulations also underline that this legal assistance should be of sufficient quality, because they prescribe that lawyers should only accept a case when they are sufficiently qualified to conduct the case. Hence, these regulations correspond with the suspects' and accused persons' right to defence and reflect the core principles of professionalism and professional independence. In conclusion, these regulations are compatible with both elements of the

[28] See Chapter 3, para. 2.3.2.

normative framework and should be part of an EU system of regulations governing the conduct of criminal defence lawyers.

Less compatible with the normative framework seem to be the regulations which do not allow (criminal defence) lawyers to refuse an appointed case or withdraw from such a case, unless they provide either justification or request approval. The regulations identified show that the fact that a lawyer is appointed to represent a suspect or accused person adds another dimension to the lawyer's role as legal representative, namely the lawyer's accountability to the authority that has appointed him. This might lead to the situation where legal representation is actually forced upon the accused person, which arguably makes it more difficult for a lawyer to build a lawyer-client relationship based on mutual trust. Such regulations are thus arguably counterproductive to the principle of confidentiality and partiality and to the accused's right to defend himself. At the same time it should be recalled that the accused's right to defend himself is not absolute; for reasons of efficiency and effective exercise of defence rights, compulsory appointment of a lawyer is accepted by the ECtHR. As such, the regulations identified are not necessarily incompatible with the procedural element of the normative framework, but the regulations do infringe at least in part upon the criminal defence lawyer's professional independence and arguably obstruct establishing a fiduciary lawyer-client relationship and therewith are not compatible with the principle of confidentiality and partiality. The German regulations stipulating that appointment should be refused when it is clear that the accused does not want to be represented show more respect to the autonomous position of both criminal defence lawyer and accused person. The German regulations therefore are compatible with both elements of the normative framework.

Without the possibility of legal aid, effective criminal defence becomes illusory. This research does not address the details of the organisation of legal aid schemes, but focuses on the criminal defence lawyer's conduct as a legal aid provider. According to the deontological regulations identified, lawyers are obliged to inform their clients about the possibility of legal aid. An aspect which deserves close attention is the quality of legal aid providers. Although this research only includes monitoring mechanisms which are used in England and Wales and the Netherlands, it is a first indication that the quality of legal aid providers can be monitored in very different ways. Legal aid budget cuts force criminal defence lawyers to expand their field of expertise in order to make a living, which might lead to fewer lawyers being specialised in criminal defence. An effective system of criminal legal aid offered by specialised and trained criminal defence lawyers is only possible with sufficient remuneration. Essential components of an EU system of regulations governing the conduct of criminal defence lawyers are therefore a proper monitoring mechanism for the quality of criminal legal aid providers and the provision of sufficient remuneration for legal aid providers.

Another aspect of the criminal defence lawyer's role as legal representative concerns the question of who is in charge of the defence (*dominus litis*). This aspect represents the balance between the principle of partiality and the principle of professional independence on the one hand and the right of the accused person to defend himself on the other. The regulations show a different approach to establishing this balance. All regulations recognise that there is a difference in level of legal knowledge and skills between the lawyer and the client. However, the regulations differ as to how the lawyer should deal with this difference. On the one hand there is a group of regulations, emphasising that the lawyer should be in charge of at least the legal part of the defence strategy. On the other hand, there are regulations prescribing that the lawyer should use his legal knowledge to elaborately advise the client on all defence options and then leave the final decision to the client, thus putting the client in charge of the defence. Again, the right to defend oneself is not absolute, so that these regulations are compatible with the procedural element of the normative framework. Regarding compatibility with the deontological element of the normative framework, the regulations seem to be compatible with the principles of partiality and professional independence, as long as the decisions made by the criminal defence lawyer are always in the accused person's best interests. However, further research is recommended regarding the differences in regulations which were identified in this research, because these differences are most likely caused by differences in defence culture and organisation of criminal proceedings in the Member States.

It has become clear from the results of this research that none of the codes of conduct prohibit defending more than one client in the same case as a matter of principle. This corresponds with the idea that each suspect and accused person is entitled to an effective defence and under certain circumstances a joint defence can be the most effective for co-accused. The majority of these regulations do prohibit lawyers from representing more than one client in the same in case of (potentially) conflicting interests. This prohibition flows from the core principles of partiality, confidentiality and professional independence and is also in line with the accused person's right to an effective defence, because a joint defence can hardly be effective when the co-accused have conflicting interests. Therefore, before deciding to take on representation of more than one accused, the lawyer will have to consider whether such a joint defence might conflict with his duty of confidentiality or partiality. Usually, when the lawyer decides that he will provide the co-accused with different legal advice, there is a strong indication of (potentially) conflicting interests and a joint defence will not benefit the accused and might also be counterproductive regarding the core principles of confidentiality and partiality. Another contraindication for a joint defence could be that one of the co-accused is noticeably in charge of the defence, even to the extent that it might jeopardise the lawyer's independent position. The regulations identified in the German Statements on criminal defence show a different approach to preserving partiality

and confidentiality in cases with co-accused. Each accused is represented by a separate criminal defence lawyer and all lawyers coordinate a joint defence of all the accused. The regulations identified all focus on preservation of the core principles of partiality, confidentiality and professional independence and on offering a criminal defence which is in the best interests of each individual accused, which is in line with both elements of the normative framework.

A very specific aspect of the criminal defence lawyer's role as legal representative concerns representation at the police station, particularly prior to and during police interrogation. It is an increasingly important aspect because more and more emphasis is being put on the pre-trial phase of criminal proceedings throughout the EU. It is also a complex aspect, because many different topics covered in this research are relevant, such as access to case material, financial compensation for legal aid providers, confidential and unsupervised communication with the accused, and advising on the defence strategy. This research shows that in at least 4 Member States (France, Belgium, the Netherlands, and England and Wales), specific regulations exist for criminal defence lawyers assisting suspects in police custody. These regulations have several common aspects, such as a focus on the suspect's right to confidential communication with his lawyer prior to the interrogation, his right to be informed of his defence rights, and his right to be assisted by a lawyer during interrogation so that he can be advised on, for example, invoking his right to silence during interrogation. All regulations, moreover, promote an active and dynamic attitude of the lawyer during interrogations. These regulations are compatible with the normative framework, although similar regulations should be available in all Member States to ensure that the conduct of criminal defence lawyers in this important phase of proceedings is sufficiently regulated. The complexity and delimited scope of application of this subject matter may justify developing a separate EU Protocol for criminal defence lawyers who assist suspects in police custody to provide minimum standards at EU level which can be implemented in the Member States. Further research, however, would be needed to determine the deontological regulations needed to regulate legal assistance prior to and during police interrogation in the remaining EU Member States.

Lastly, an interesting side effect of this research is that it also reveals unique regulations in the Member States. Regarding the criminal defence lawyer's role as legal representative, the Dutch regulations on the temporary prohibition of lawyer-client contact stands out. When tested against the normative framework, it is clear that it violates the principle of free lawyer-client communication and hinders the lawyer and the accused from properly preparing the defence strategy. It has been argued that appointing a substitute lawyer is an insufficient remedy, so that this regulation actually makes the right to legal assistance illusory. As such, this regulation conflicts with both elements of the normative framework. This does not, however, imply that lawyers are free to misuse their professional privileges.

Even more so, any abuse should be subject to immediate disciplinary sanctions in order to uphold societal trust in the legal profession as a whole. This research shows that standing disciplinary case law on this subject matter is very strict.

3 The Criminal Defence Lawyer as Strategic Adviser

The right to a fair trial includes the right to have adequate time and facilities to prepare the defence, which is crucial in determining a proper defence strategy. This right includes the right to information, in particular to information about the prosecution's case. The criminal defence lawyer has an important role in gathering this information, for example by urging the police and the prosecution to disclose information or by interviewing witnesses himself. The question posed was, however, whether lawyers were always allowed to contact witnesses pre-trial and if so, how is this contact regulated? The criminal defence lawyer also needs this information in order to properly advise the accused on silence and settlement proceedings. Another question in that regard was therefore what, if any, are the rules of conduct concerning advice on silence or settling the case when the prosecution's case is not yet sufficient? Lastly, it is important that the defence lawyer and the accused understand each other, which means that occasionally the assistance of an interpreter is needed. It is noted in this regard that the right to be able to properly prepare the defence includes the right to confidential lawyer-client communication, which means that whenever the assistance of an interpreter is necessary, it should be guaranteed that the interpreter also has a duty of confidentiality.

3.1 Recapitulation of the Normative Framework[29]

The criminal defence lawyer's role as strategic adviser is determined by several aspects related to the accused's right to have adequate time and facilities to prepare the defence. This right is referred to in Article 6 § 3 (b) ECHR, Article 48 EU Charter, recitals 22 and 23 of EU Directive 2013/48 on the right to legal assistance, recital 19 and Article 2 §§ 1 and 2 of EU Directive 2010/64 on the right to interpretation and translation, and Articles 3, 6 and 7 of EU Directive 2012/13 on the right to information. How much time is needed to properly prepare the defence depends on the specific circumstances of the case, such as the complexity of the case and the severity of the sentence that can be imposed. The defence lawyer's workload has to be taken into account as well, although lawyers should show some flexibility in organising their workload. Adequate facilities include proper and timely prosecution disclosure and access to the case file, confidential lawyer-client communication (if necessary

[29] See Chapter 2, para. 2.2 for extensive references to relevant literature and case law.

with the assistance of an interpreter), which includes free and unrestricted exchange of information between the lawyer and the accused and sufficient opportunities for the accused to read and write when preparing of his defence.

The right to information is an important part of the right to have adequate time and facilities to prepare the defence. According to EU Directive 2012/13 on the right to information, this includes being timely informed of procedural rights, the nature of the accusation, and access to case material. The last is particularly important when it comes to the criminal defence lawyer's role as strategic adviser. According to standing ECtHR case law, case material should be made available by the prosecution to the defence as soon as possible. It is not sufficient to merely provide abstracts or an oral account of the material. On the other hand, the right to have access to case material is not absolute and may be restricted in the interests of the criminal investigation.

Information about the accused's case not only is found in the case material, but can also be obtained by conducting an investigation for the defence. With regard to the principle of equality of arms and the right to an adversarial trial, both of which are inherent features of the right to a fair trial, the defence has the right to examine witnesses (Article 6 § 3 (d) ECHR). This right is not absolute and the interests of the criminal investigation or efficiency of the trial might require limitations regarding the defence's requests to examine certain witnesses. In his role as strategic adviser, sufficient and timely access to case material is crucial to the criminal defence lawyer in order to properly advise the accused on whether to invoke silence or to enter into settlement proceedings. According to standing ECtHR case law, settling criminal proceedings through, for example, plea bargaining is not in itself in violation of the right to a fair trial. However, the accused must be fully aware of the facts of the case and of the legal consequences of his choice to settle the case. He will have to make this choice in a genuinely voluntary manner. It is therefore the criminal defence lawyer's duty to properly advise the accused, which can only be done if he has sufficient knowledge of the prosecution's case against the accused. Furthermore, the ECtHR recognises the right to silence and the privilege against self-incrimination as fundamental aspects of the right to a fair trial. The criminal defence lawyer's presence during the pre-trial phase, particularly during police interrogation, plays a crucial role in safeguarding the essence of the privilege against self-incrimination. During this pre-trial phase the lawyer will have to advise the accused on his right to silence; however, this can only be properly done if the lawyer has sufficient knowledge of the prosecution's case against the accused. This becomes even more important when the criminal justice system in which the criminal defence lawyer has to operate allows adverse inferences to be drawn from an accused's silence pre-trial. Even more so, since drawing adverse inferences in itself is not incompatible with the privilege against self-incrimination according to standing ECtHR case law. However, according to the ECtHR, inferences may only be drawn if the accused remains silent after repeated warnings that his

silence may be used against him and despite strong evidence against the accused which requires an answer by the accused. Moreover, sufficient procedural safeguards, such as effective legal assistance, have to be in place.

Lastly, States, according to EU Directive 2010/64 on the right to interpretation and translation, have a positive obligation to determine whether an accused needs the assistance of an interpreter and/or translator and, if this is the case, this assistance has to be made available. This right covers all stages of criminal proceedings. According to EU Directive 2010/64, the right to the assistance of an interpreter during lawyer-client communication is part of the right to a fair trial.

Regarding the deontological element of the normative framework, the core principles of confidentiality and partiality are key to the criminal defence lawyer's role as strategic adviser. Without confidentiality it is less likely that the suspect or accused person will share information with the criminal defence lawyer, which will make it more difficult if not impossible for the lawyer to properly advise the client on the defence strategy. When weighing all the interests involved, the lawyer has to realise that his client's interests are paramount. This is a direct consequence of the principle of partiality.

3.2 Regulations in Common

3.2.1 Keeping the Accused Informed of the Case[30]

Only in Belgium (Flanders) was a specific regulation for criminal defence lawyers identified in the general code of conduct regarding the lawyer's duty to keep the accused informed of the case. According to this regulation, lawyers are allowed to provide their clients with a copy of the case file. Additionally, in 10 Member States[31] general regulations were identified in the general codes of conduct concerning the obligation of the lawyer to keep his clients informed of the progress of the case. According to these regulations, lawyers should keep their clients duly informed of the progress of the case. The regulations differ slightly regarding the extent to which the lawyer should actually share information with his client. Although some regulations are more detailed than others, all regulations provide that this duty does not depend only on whether the client requests being informed.

[30] See Chapter 3, para. 3.2.5.

[31] The Czech Republic, Denmark, England and Wales, Estonia, Finland, Italy, the Netherlands, Poland, Slovakia, and Sweden.

3.3 Differences in Regulations

3.3.1 Access to Case Materials[32]

Timely prosecution disclosure is essential for a proper preparation of the defence strategy. It will, for example, be rather difficult for a criminal defence lawyer to advise on silence or settling the case without sufficient knowledge of the strength of the prosecution's case against his client. None of the general codes of conduct, however, provide regulations regarding access to case material. In the specific sets of regulations for criminal defence, some relevant regulations were identified. The Dutch Statute for criminal defence lawyers[33] and the Austrian Basic Principles for criminal defence[34] emphasise that the accused's interests should always prevail over the interests of the criminal investigation, which means that the lawyer should always have full and timely access to case material. The German Statements on criminal defence[35] place an active duty on the lawyer: as soon as the lawyer has accepted the case he will have to seek full access to the case file. The Scottish Code of Conduct for criminal work[36] prescribes that lawyers are not allowed to share copies of particularly sensitive case material with their clients, for example, witness statements of victims of sexual offences. Lastly, according to English regulations[37] the level of prosecution disclosure is made dependent on "defence statements". These statements include not only details of the defence strategy, but should also include an exact description and motivation which prosecution material they wish to be disclosed and why they believe that this material is in the prosecution's possession. Incomplete defence statements can be held against the accused, on the other hand the Practice Notes emphasise that the accused can never be forced to incriminate himself. This means that the criminal defence lawyer will have to carefully advise the accused on what to include in the defence statement.

3.3.2 Advising on Silence[38]

None of the general codes of conduct provide regulations relating to advising on the right to silence, which is probably due to the fact that the right to silence is a specific aspect of criminal proceedings, which will not be regulated in general codes of conduct. The specific

[32] See Chapter 3, para. 3.2.
[33] See Chapter 3, para. 2.3.2.
[34] See Chapter 3, para. 2.1.3.
[35] See Chapter 3, para. 2.2.
[36] See Chapter 3, para. 2.8.
[37] See Chapter 3, para. 2.5.1.
[38] See Chapter 3, para. 3.2.1.

sets of regulations which were identified in Austria, Germany, England and Wales, the Netherlands and Scotland, however, also do not pay specific attention to advising the suspect on the right to silence. It is only mentioned in the guidance to the Dutch Statute for criminal defence lawyers that lawyers should never be tempted to accept payment by third parties if this means that they will have to ensure that the accused invokes his right to silence.[39] Additionally, the Belgian *Salduz* code provides that the only proper advice in the absence of sufficient prosecution disclosure is to advise the accused to invoke his right to silence, at least until there is more information on the prosecution's case available.[40] The French Report on the first definition on the role of the lawyer during police custody only mentions that the criminal defence lawyer has to be allowed to advise his client on his right to silence during interrogation.[41] Similar provisions can be found in the Dutch Protocol and Guidelines for police interrogation and the English Practice Code C.[42]

Advising on the right to silence in England and Wales has been discussed in this research by way of exemplary illustration of the deontological dilemmas faced by criminal defence lawyers when advising clients on their right to silence.[43] It should be noted that drawing adverse inferences from a suspect's silence is statutorily regulated in England and Wales. According to standing case law, legal advice to invoke silence does not automatically protect the accused against the drawing of adverse inferences from his silence. Only when legal advice to remain silent is based on 'good' reasons or 'soundly based objectives' can it offer protection against adverse inferences. The court is only able to fully assess the basis for legal advice if confidential and privileged information is disclosed by the lawyer. Yet, the lawyer is only allowed to disclose privileged information with the client's consent. This means that the lawyer is fully dependent on his client's conduct in this matter.

3.3.3 Advising on Settling the Case[44]

In order to keep the criminal justice system manageable, settlement and out-of-court settlement proceedings have been incorporated in many jurisdictions across Europe. The most common form of settlement is known as plea bargaining. Yet only in 4 Member States (England and Wales, Estonia, Ireland, Lithuania and Scotland) have specific regulations been identified in the general codes of conduct on advising on how to plead. These regulations vary significantly. According to the Estonian and Lithuanian regulations, lawyers are only

[39] See Chapter 3, para. 2.3.1.
[40] See Chapter 3, para. 2.9.1.
[41] See Chapter 3, para. 2.9.2.
[42] See Chapter 3, para. 2.9.3 and para. 2.9.4.
[43] See Chapter 3, para. 3.2.1.1.
[44] See Chapter 3, para. 3.2.2.

bound by the accused's plea of not guilty. If the accused pleads guilty, the regulations prescribe that the lawyer takes an independent position and if he believes that the accused wants to plead guilty contrary to the facts of the case, then he will have to conduct a defence based on the accused's innocence. The Irish, Scottish and English regulations focus on the situation where the accused admits guilt to his lawyer. If this happens, the lawyer is limited in the way he is able to conduct the defence. In this case, for example, it is no longer possible for the lawyer to set up a defence actively asserting the accused's innocence. It will, however, still be possible to challenge the reliability of prosecution evidence and to cross-examine witnesses. The lawyer is also allowed to point out to the jury that the prosecution did not succeed in establishing the accused's guilt.

In addition to the regulations identified in the general codes of conduct as described above, specific regulations on advising on settlement proceedings were also found in the English Practice Notes[45] and Ethics Guidance of the Bar,[46] in the Austrian Basic Principles for criminal defence[47] and in the German Statements on criminal defence.[48] The English regulations pay particular attention to the fact that often advice on pleading guilty has to be provided when there is not yet full or partial prosecution disclosure. The only proper legal advice at that point is to not plead guilty, at least until there is full prosecution disclosure. The court will have to be notified of the predicament the accused is in. Indeed, the earlier the plea, the greater the reduction of the sentence, although, because the accused has to wait for prosecution disclosure before being able to determine whether a plea of guilty will be the best defence strategy, his plea will be later rather than sooner. It is therefore the criminal defence lawyer's duty to inform the court that a definite plea will be entered as soon as there is sufficient prosecution disclosure. And it is therefore also the lawyer's duty to ensure that he keeps himself informed about the latest status of prosecution disclosure throughout the proceedings in order to adjust his legal advice. The Austrian and German regulations both emphasise that any settlement proceedings can only be agreed upon with the explicit, informed and prior consent of the client. This means that the lawyer will have to fully inform the client about the legal and other consequences of the settlement. Despite the fact that also in the Netherlands criminal proceedings are regularly settled out-of-court, the Dutch Statute does not provide any guidance to criminal defence lawyers in this matter. This is a lacuna which does not contribute to an effective defence.

[45] See Chapter 3, para. 2.5.2.
[46] See Chapter 3, para. 2.6.7.
[47] See Chapter 3, para. 2.1.3.
[48] See Chapter 3, para. 2.2.

3.3.4 Contacting Witnesses Pre-Trial[49]

In 3 Member States (Ireland, Italy, and the Netherlands[50]) specific regulations in the general codes of conduct have been identified regarding the conduct of criminal defence lawyers when contacting witnesses pre-trial. All these regulations allow lawyers to contact witnesses throughout criminal proceedings, although all regulations also emphasise that lawyers should be careful not to raise any suspicion of having influenced the witness regarding the contents of his statements. The Irish regulations suggest that it is very rare for criminal defence lawyers to interview a witness for the prosecution and that the fact that a witness has been interviewed may weaken the cross-examination at trial.

In all the specific sets of regulations for criminal defence lawyers reference is made to the lawyer's authority to contact witnesses throughout proceedings. The Dutch Statute for criminal defence lawyers emphasises the importance of the lawyer's ability to contact witnesses.[51] The Austrian Basic Principles for criminal defence[52] and the German Statements on criminal defence[53] allow and also encourage criminal defence lawyers to contact witnesses pre-trial. The German regulations recommend that lawyers carefully document any contact between them and witnesses in order to avoid any discussion later at trial. According to the Scottish Code of Conduct for criminal work,[54] lawyers are allowed to contact witnesses pre-trial, and they even have a duty to prepare witnesses for their appearance in court. In England and Wales it has been a longstanding tradition of solicitors in particular to interview witnesses pre-trial. Solicitors are even obliged to interview witnesses in order to determine whether the witnesses' statements will be of use to the defence, before they are able to include the names of these witnesses in the "defence witness notice".[55] Barristers are also allowed to contact witnesses pre-trial, but only for the purpose of familiarising witnesses with their appearance in court.[56]

In addition to these specific regulations for criminal defence lawyers, general regulations allowing lawyers to contact witnesses throughout proceedings were identified in the general codes of conduct of 10 Member States.[57] All these regulations strongly and explicitly

[49] See Chapter 3, para. 3.2.3.
[50] In the Netherlands these regulations are incorporated in the guidance to rule 22 § 1.
[51] See Chapter 3, para. 2.3.1.2. This regulation should be read in light of the previous Dutch general code of conduct, which explicitly prohibited criminal defence lawyers from contacting witnesses for the prosecution pre-trial. This rule has been abolished in the latest version of the general code of conduct.
[52] See Chapter 3, para. 2.1.3.
[53] See Chapter 3, para. 2.2.
[54] See Chapter 3, para. 2.8.
[55] See Chapter 3, para. 2.5.5.
[56] See Chapter 3, para. 2.6.5.
[57] Austria, Croatia, Denmark, England and Wales, Estonia, Finland, Ireland, Malta, Slovakia, and Sweden.

emphasise that even the slightest appearance of influencing witnesses should be avoided by the lawyer.

Lastly, in 2 Member States, namely in Belgium (Wallonia) and Luxembourg, general regulations were found explicitly prohibiting lawyers from having any contact with any witnesses during proceedings. This prohibition includes witnesses for the defence. Only in highly exceptional cases is contact with witnesses allowed, but only in writing.

3.3.5 Assistance of Interpreters during Lawyer-Client Communications[58]

None of the codes of conduct under review explicitly refer to the assistance of interpreters during lawyer-client communications. Only the English Law Society issued a Practice Note on assistance of interpreters throughout criminal proceedings,[59] which briefly addresses the situation when an interpreter is needed during lawyer-client consultations at the police station. According to this Practice Note, use of the police station interpreter is appropriate. However, there are situations in which it is better to request the assistance of another interpreter, for example, when there are multiple suspects or when the suspect informs the criminal defence lawyer that he does not trust the interpreter because he is also working for the police.

3.4 Synthesis

Criminal defence lawyers need sufficient information on their client's case in order to properly fulfil their role as strategic adviser. This is reflected in the normative framework, which stipulates that the defence has the right to timely and sufficient access to information. This right is not absolute and may be temporarily or fully restricted, for example, if this is in the interests of the progress of the criminal investigation. The regulations in the specific sets of regulations as identified in several EU Member States emphasise the principle of equality of arms and the starting point that the accused's interests should always prevail over the interests of the criminal investigation. This means that the defence should be granted full and timely access to case materials. This underlines the starting point as presented in the normative framework and supports the lawyer in fulfilling his role as strategic adviser. In order to strengthen this position, it is recommended to include some procedural safeguards in an EU system of regulations governing the conduct of criminal defence lawyers, referring to the right of the defence to have timely and full access to case materials.

[58] See Chapter 3, para. 3.2.4.
[59] See Chapter 3, para. 2.5.8.

In a more deontological angle of approach to the matter of access to case material, the EU system of regulations could promote an active attitude among criminal defence lawyers in obtaining full access to case material as soon as they have accepted the case. The regulations as identified in the German Statements on criminal defence could serve as an example. In this regard the regulations that were identified in England and Wales regarding defence statements as a precondition for prosecution disclosure should also be mentioned. It is questionable whether such far-reaching requirements are compatible with the normative framework. Is it reasonable to expect from the defence that they are able to describe in detail which case material they wish the prosecution to disclose? It assumes that the defence knows which material is in the prosecution's possession and it requires the defence to disclose details of their defence strategy before knowing what the prosecution's case is. In fact, it could be argued that such requirements make the accused's right to a fair trial illusory. The concept of equality of arms is arguably under pressure here. Not only does the prosecution usually have more means at its disposal to investigate a case, it also goes against ECHR principles such as the right not to incriminate oneself to demand from a suspect or accused person that he discloses details about his defence. In sum, the English regulations on defence statements seem to be incompatible with both elements of the normative framework.

Timely and full prosecution disclosure is in particular important when considering the criminal defence lawyer's conduct when advising the accused on his right to silence and on settling the case. None of the deontological regulations under review refer to advising on the right to silence. This research, however, shows what the impact of adverse inferences can be on the lawyer's conduct when advising an accused on his right to silence. The drawing of adverse inferences is not in itself incompatible with the normative framework. According to standing ECtHR case law, adverse inferences can be drawn from an accused's silence, although the fact that the suspect remained silent in the early stages of proceedings cannot be the only evidence on which a conviction is based. Moreover, ECtHR case law emphasises that the court should take into account that the accused might have remained silent upon legal advice and that this advice may have been provided for a good reason. The question is whether this also implies that the court is allowed to actually assess the reasons for the legal advice. This touches upon the deontological element of the normative framework: does an assessment of the court of the reasons for a specific legal advice infringe on the core principles of professional independence and confidentiality? It could be argued that it does infringe on the lawyer's professional independence and duty of confidentiality, since the ECtHR also explicitly ruled that involvement in the lawyer-client relationship should be kept to a minimum out of respect for the professional independence of the lawyer and the confidential character of the lawyer-client relationship. In sum, it can be concluded from this research that the practice of drawing adverse inferences from silence does not violate the

procedural element of the normative framework. The deontological element of the framework, however, may cause problems, in particular when the lawyer has to give account for the legal advice provided to the suspect or accused person. In that case the lawyer's core principles of professional independence and confidentiality may be seriously infringed. Moreover, the fact that legal advice may be under review by the court or other authorities might have an undesirable chilling effect on the lawyer's ability to freely advise his client on his defence strategy.

When advising the accused on whether or not to settle the case, for example by plea bargaining, criminal defence lawyers are confronted with similar deontological challenges. Contrary to the lack of regulations regarding advising on silence, some regulations were identified concerning advising on settling the case. Not all of these regulations seem to be compatible with the normative framework. Regulations were identified which prescribe that the lawyer has to take an independent position when the client wishes to plead guilty if the lawyer believes that this would be contrary to the truth. It is not clear how these regulations relate to the commonly accepted idea that it is the judge who decides guilt, not the criminal defence lawyer. Moreover, although these regulations support the lawyer's professional independence and therewith are, at least partly, compatible with the deontological element of the normative framework, they are counterproductive to the accused's right to defend himself and it could also be argued that the regulations contradict the core principle of partiality. Indeed, it will be virtually impossible for the lawyer to assume a partisan position as the accused person's representative when the accused person and the lawyer both wish to follow a different defence strategy. Moreover, the lawyer would disregard the accused person's wishes with regard to the defence strategy. Other regulations prescribe that the lawyer has a duty to fully inform the client about the nature of the settlement proceedings and the legal consequences should the client want to settle the case. With this advice the client himself can make an informed decision on how to proceed with the case. These regulations also emphasise that the lawyer should adapt his legal advice on settling the case depending on the amount of prosecution disclosure, which means that the legal advice might have to be adjusted during the criminal proceedings. These regulations are compatible with both elements of the normative framework.

Relevant information to support the defence strategy is collected not only from case materials, but also from interviews with witnesses, in particular when those witnesses are interviewed pre-trial. One of the fundamental elements of the accused's right to a fair trial, and therefore part of the procedural element of the normative framework, is the right to examine witnesses or have witnesses examined. Any deontological regulations prohibiting criminal defence lawyers from contacting witnesses are thus incompatible with the procedural element of the normative framework. Such regulations violate the concept of equality of arms, the right to have sufficient time and facilities to prepare the defence and

the right to a fair trial and an effective defence in general. These common procedural safeguards and rights supersede any legal tradition and it is therefore important to include guarantees in the EU system of regulations concerning the starting point that the defence should have the authority to attend witness interviews pre-trial and to take statements from witnesses which can be used as evidence to support the accused person's case if necessary. Additionally, lack of resources and proper financial support by way of legal aid provisions to actually perform investigation for the defence might make the possibility to examine witnesses pre-trial illusory, so that the EU system should ideally also address this aspect. Moreover, rules of conduct should be included emphasising that the criminal defence lawyer should do his utmost to avoid any (appearance of) influencing the witness in order to uphold societal and governmental trust in the legal profession's integrity as a whole, which corresponds with the principle of professionalism and integrity. The wording of such regulations, however, has to be chosen carefully to avoid any chilling effect on actually exercising this authority.

In preparation of the defence strategy, communication between the lawyer and the accused is key. It follows from several deontological regulations identified in this research that the lawyer has a duty to keep his client informed of the progress of his case irrespective of the client's wish to be informed. These regulations support the right to effective defence and a fair trial, since they enhance the effectiveness of the preparation of the defence strategy. Moreover, they adhere to core principles of professionalism and integrity. Indeed, lawyers show a certain level of professionalism by keeping their clients informed and therewith allow clients to at least co-decide on the defence strategy. Regarding this aspect of the criminal defence lawyer's role as strategic adviser, the English regulations in the SRA code of conduct stand out. According to these regulations, the solicitor can be prohibited from sharing certain case material with his client in the interests of the criminal investigation, to protect national security or to prevent criminal acts from being committed. Although the reasons for this prohibition are clearly formulated and delimited and therefore compatible with the procedural element of the normative framework, they are arguably interfering with the deontological element of the normative framework, in particular with the core principle of confidentiality. If the solicitor is not free to share all case materials with his client, the solicitor is actually not free to have an open relationship with the client, which is needed as a basis for the mutual trust underlying the fiduciary lawyer-client relationship. Moreover, preparation of the defence strategy is limited by this prohibition on sharing certain case materials.

Preparing the defence strategy not only requires sufficient information about the accused's case and the prosecution evidence, but also clear communication between the lawyer and the client. Since language barriers could severely disturb this communication, the assistance of an interpreter may be desirable. Often lawyer-client communication will be

conducted when the accused is in police custody. For practical reasons, reasons of efficiency or lack of availability on short notice of competent interpreters, it could be tempting to request the assistance of readily available police station interpreters. Such practice, however, brings serious risks to the confidential character of lawyer-client communication. In this research relevant regulations were only identified in England and Wales, which also warn lawyers about the risks of using police station interpreters. According to the procedural element of the normative framework, accused persons are entitled to the assistance of an interpreter (EU Directive 2010/64). Criminal defence lawyers should properly inform themselves of the possibilities of appointing competent interpreters to assist them during lawyer-client communication and should be aware of the risks and challenges of using the services of police station interpreters.

4 The Criminal Defence Lawyer as Trusted Counsellor

The criminal defence lawyer's role as trusted counsellor can be considered as the backbone of the lawyer-client relationship. This role is determined by the duty of confidentiality and the legal concept of professional privilege. Questions that arose in respect of this role concerned, for example, which material is covered by confidentiality and privilege? In what circumstances is the criminal defence lawyer allowed to breach his duty of confidentiality? How is confidential and privileged information protected from third-party interference, in particular in the context of criminal investigations? Is the criminal defence lawyer allowed to accept payment from third parties for the legal assistance offered to the accused? And what are the lawyer's responsibilities when the client insists on making certain confidential information public?

4.1 Recapitulation of the Normative Framework[60]

The duty of confidentiality and legal professional privilege are derived from the right to privacy as laid down in Article 8 ECHR, Article 7 EU Charter and recitals 33-34, and Article 4 of EU Directive 2013/48. According to standing ECtHR case law, Article 8 offers strengthened protection to lawyer-client communications. Moreover, the EU Member States have a positive obligation to also guarantee this confidentiality and respect legal professional privilege.

Confidentiality and legal professional privilege are not absolute, which means that interferences are allowed, for example, when it follows from objective and factual circumstances that the criminal defence lawyer is involved in criminal activities with his client

[60] See Chapter 2, para. 2.3 for extensive references to relevant literature and case law.

and therefore has become a suspect himself or if breaching confidentiality or professional privilege is necessary to safeguard national security. Yet, interferences on confidentiality and legal professional privilege, for example by covert surveillance or searches and seizure at the lawyer's (professional) premises, have to be counterbalanced by strict and sufficient safeguards to prevent abuse of these measures. With regard to covert surveillance, such safeguards include explicit, accessible and foreseeable legislation setting out the nature of offences that can give rise to a surveillance order, precise and sufficient wording of the order and effective application of this order in practice, a limitation on the duration of the order, a procedure for examining, using and storing intercepted data and regulations for erasing privileged data. When it concerns searches of the lawyer's premises (this includes private as well as professional premises), the ECtHR mentions the presence of independent observers during the search as an important safeguard. Lastly, the order for surveillance or search has to be proportionate, which means that other evidence in the case has to be weighed and the possible repercussions of the measures on the lawyer's reputation and work also have to be taken into account.

Concerning the deontological element of the normative framework, the core principles of confidentiality and partiality play a crucial role in the criminal defence lawyer's role as trusted counsellor. Without confidentiality it is virtually impossible to build a lawyer-client relationship based on mutual trust, which will make it more difficult for accused persons to share information with their lawyer. This might eventually be detrimental to an effective preparation of the defence strategy. In a broader sense, confidentiality is necessary to uphold societal trust in the legal profession and to ensure that prospective clients will not be hindered from seeking legal advice when necessary. In order to maintain the client's confidence, the criminal defence lawyer will have to act as a partisan defender of his client's interests.

4.2 Regulations in Common

4.2.1 Duty of Confidentiality[61]

All general codes of conduct and specific sets of regulations for criminal defence lawyers refer to the duty of confidentiality, which generally means that the lawyer is obliged to keep confidential anything the client tells him within the ambit of the professional lawyer-client relationship.[62] This duty is not limited in time, so that it continues after the lawyer-client

[61] See Chapter 3, para. 3.3.1.

[62] In some Member States, such as England and Wales and the Netherlands, the duty of confidentiality is also statutorily regulated (in LSA 2007, s. 1 (3)(e) and Act on Advocates, Art. 11a respectively).

relationship has ended and after the client's death. Moreover, not only the lawyer, but also his employees are bound by the duty of confidentiality.

4.3 Differences in Regulations

4.3.1 Exceptions to the Duty of Confidentiality[63]

The majority of general codes of conduct (19 in total)[64] provide exceptions to the duty of confidentiality. First, lawyers are no longer bound by the duty of confidentiality if the client consents to disclosure (this includes all codes except Bulgaria, Cyprus, Germany, Romania, and Spain). Disclosure should, however, be in the client's interests (Belgium, England and Wales, Luxembourg, the Netherlands, and Slovenia). The Dutch Statute for criminal defence lawyers adds to this exception that final responsibility for disclosure of confidential material always lies with the lawyer, despite the fact that the client has consented to disclosure.[65] This means that the lawyer ultimately decides whether publication of confidential information is in the best interest of the client. According to the German Statements on criminal defence, a lawyer can never be obliged to disclose confidential information, either by his client or by a judicial authority.[66] Second, an exception can be made to the duty of confidentiality if this exception is prescribed by law (England and Wales, Estonia, Finland, Malta, Scotland, and Sweden) or ordered by the court or a statutory body (Ireland and Scotland). It should be noted that this exception can also be made in statutory regulations, such as in the Netherlands.[67] Third, the lawyer is allowed to breach his duty of confidentiality in order to defend himself in criminal proceedings (Bulgaria, Cyprus, Germany, and Romania) or in disciplinary proceedings (Italy, Bulgaria, Cyprus, Ireland, Luxembourg, Romania, Malta, and Sweden) or in either proceedings (Belgium, France, Croatia, Finland, and Slovenia). Fourth, exceptions can be made to prevent a client from committing a serious crime (Italy). Fifth, confidentiality can be breached if this information is necessary to explain why the lawyer has decided to withdraw from a case (Croatia). The last exception concerns the collection of outstanding payment, which is also a valid reason for breaching confidentiality (Finland and Romania).

It has already been mentioned that exceptions to the duty of confidentiality can be made within the context of disciplinary proceedings. By way of illustration, the regulations in

[63] See Chapter 3, para. 3.3.1.1.
[64] Belgium, Bulgaria, Croatia, Cyprus, England and Wales, Estonia, Finland, Germany, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Romania, Scotland, Slovenia, Spain, and Sweden.
[65] See Chapter 3, para. 2.3.1.1.
[66] See Chapter 3, para. 2.2.
[67] According to Act on Advocates, Art. 11a exceptions to the duty of confidentiality can be made by law.

England and Wales and the Netherlands have been discussed.[68] When a client files a disciplinary complaint against his lawyer, he impliedly waives confidentiality; this is the case in both England and Wales and the Netherlands. Without this implied waiver it would become very difficult for lawyers to defend themselves against a client's disciplinary complaints. In the Netherlands, the lawyer is obliged to cooperate with a disciplinary investigation conducted by the president of the local Bar Association. Without this obligation to cooperate, the supervisory role of the president of the Bar would become rather pointless. However, disciplinary hearings can be held behind closed doors in order to safeguard the confidential character of the information that is exchanged during such hearings.

4.3.2 Legal Professional Privilege: Search and Seizure at Law Firms[69]

Eight Member States[70] provide regulations in their general codes of conduct regarding the protection of legal professional privilege. Additionally, England and Wales[71] and the Netherlands[72] provide specific and separate guidelines for criminal defence lawyers on the protection of legal professional privilege during searches and seizures. The Dutch guidelines are very practice-based and detailed. They serve as a practical checklist for lawyers and presidents of local Bar Associations on how legal professional privilege is best protected during searches and seizures. The English regulations are specifically aimed at barristers who are appointed as independent counsel to assist the police during searches and seizures.

The regulations, except those of Ireland, Croatia and Cyprus, mention that an independent and knowledgeable person should be present during the search to safeguard confidentiality and legal professional privilege. Most regulations refer to Bar representatives in this respect. In England and Wales, a barrister is appointed as independent counsel to fulfil this role.

Most of the regulations do not make a distinction between the premises where the search takes place, so that legal professional privilege can and should be invoked irrespective of the premises (professional or personal) where the search takes place. Only the Croatian regulations limit the application of legal privilege to material which is stored at the lawyer's office.

The Irish regulations provide that lawyers should not allow access to privileged information to anyone, including the police. The Cypriot regulations are the only regulations which explicitly mention that the State, court and any public authority have a duty to

[68] See Chapter 3, para. 3.3.1.2.
[69] See Chapter 3, para. 3.3.2.
[70] Austria, Croatia, Cyprus, the Czech Republic, France, Ireland, Poland, and Slovakia.
[71] See Chapter 3, para. 2.6.6.
[72] See Chapter 3, para. 2.3.1.2

recognise "professional secrecy as a fundamental and primary right and obligation" of lawyers. According to the same regulations, a lawyer is obliged to withdraw from the case if he is called as a witness in that case.

4.3.3 Accepting Instructions and Payment from Third Parties[73]

In 5 Member States[74] regulations were identified in the general codes of conduct allowing lawyers to accept instructions and payment from third parties on behalf of the client. Additionally, relevant regulations were identified in the Dutch Statute for criminal defence lawyers,[75] the German Statements on criminal defence,[76] and the Scottish Code of Conduct for criminal work,[77] prescribing that lawyers should always consult the accused and obtain the accused's consent to such an arrangement. The Dutch Statute adds that the lawyer should under no circumstances agree with conditions for the payment by a third party that would oblige him to share confidential information about the accused's case with this third party. Since potential conflicts of interests between the accused and the third party paying for his legal assistance and the accused and the lawyer should be avoided, the Belgian regulations provide that the lawyer has to check whether there is potentially or factually a conflict of interests.

In 6 Member States[78] regulations were identified in the general codes of conduct prescribing that lawyers are only allowed to take instructions directly from the client, which implies that lawyers are not allowed to accept instructions from third parties. According to the regulations, however, instructions can be provided by another lawyer on behalf of the client, or by a public authority or other competent body.

4.4 Synthesis

According to the normative framework, which includes that a fiduciary lawyer-client relationship is an essential prerequisite for an effective defence, the fundamental importance of confidentiality is reflected in all regulations identified in all EU Member States, which describe the duty of confidentiality as not limited in time and also applicable to employees of the lawyer (derived duty of confidentiality). Reference to the duty of

[73] Chapter 3, para. 3.3.3.
[74] Belgium, Germany, Ireland, Italy, and Spain.
[75] See Chapter 3, para. 2.3.1.1
[76] See Chapter 3, para. 2.2.
[77] See Chapter 3, para. 2.8.
[78] Croatia, Cyprus, Denmark, Austria, Malta, and Scotland.

confidentiality should therefore be included in an EU system of regulations governing the conduct of criminal defence lawyers.

Despite its fundamental character, the duty of confidentiality is not absolute. The majority of codes of conduct under review provide regulations that allow for exceptions to confidentiality. Although these regulations differ in the wording used, some general remarks can be made. Firstly, the lawyer should only disclose confidential information with his client's consent, but he should never be forced by the client to disclose confidential information. The lawyer should at all times maintain his professional independence towards the client and he should weigh the importance of disclosure against his client's interests. Secondly, the lawyer should be able to defend himself in disciplinary or criminal proceedings, so that if his defence requires him to disclose confidential information, he should be allowed to do so. He should, however, in accordance with the core principles of confidentiality and integrity, balance his own interests carefully with the interests of his client and only disclose confidential information if this is absolutely necessary for his defence and ensure that his client's interests will suffer as little damage as possible. Thirdly, disclosure of confidential information is allowed, even without the client's consent, in very exceptional circumstances, such as the situation in which disclosure of confidential information could prevent serious harm to others. In that case, the core principle of confidentiality requires the lawyer to only disclose information which is absolutely necessary to prevent harm being done to others, preferably without harming the interests of his own client in the process. Some of the regulations identified (also) prescribe that exceptions to the duty of confidentiality should be prescribed by law or ordered by a court or statutory body. These regulations, which allow exceptions to the duty of confidentiality, are compatible with the normative framework, as long as they do not infringe on the core of the duty of confidentiality.

There were, however, also some regulations identified which require criminal defence lawyers to provide a justification for withdrawing or not accepting an appointed case. Providing such justification might oblige the criminal defence lawyer to disclose confidential information, which makes these regulations arguably incompatible with the deontological element of the normative framework. They not only infringe upon the core principle of confidentiality, but also undermine the criminal defence lawyer's professional independence. It should be left to the lawyer's professional opinion whether he is able to accept the appointed case, without questioning the accuracy of this opinion.

Inextricably linked to the duty of confidentiality is the concept of legal professional privilege, because without legal professional privilege it is very difficult to uphold the duty of confidentiality. Although professional privilege is a legal concept, some relevant regulations were identified in the general codes of conduct under review. All these regulations contain one or more of the following elements. In order to safeguard confidentiality and legal profession privilege, a Bar representative or other independent knowledgeable person

should be present during the search of the lawyer's premises; and legal professional privilege should be invoked regarding any information present at a lawyer's premises (including private premises). It is important not to limit legal professional privilege only to the lawyer's professional premises, since the lawyer can actually carry out his profession anywhere. This is also in line with the normative framework regarding protection of Article 8 ECHR. The Dutch guidelines on protection of professional privilege during searches of a lawyer's premises are most elaborate and practice-based and could serve as a best practice for this aspect of the criminal defence lawyer's role as trusted counsellor.

In criminal proceedings, particularly when the accused is detained, criminal defence lawyers are regularly approached by third parties with a request to represent the accused. The regulations identified show a very diverse approach to this subject. On the one hand there are regulations which allow the acceptance of instructions of and/or payment by third parties, under the condition that the client consents to this practice. On the other hand there are regulations which implicitly prohibit acceptance of instructions from others than the client. Both types of regulations are, however, based on the core principles of professional independence, partiality, and confidentiality, which makes them compatible with the deontological element of the normative framework. If the lawyer decides to accept instructions of or payment by third parties, he has to be very careful to ensure that his professional independence is not jeopardised and that he is able to maintain his partisan position in defending his client's interests. This means, for example, that the lawyer should never accept payments under the condition that he will ensure that his client invokes his right to silence. Moreover, the lawyer has to be able to uphold his duty of confidentiality which, for example, means that he should not accept instructions or payment from third parties in exchange for disclosure of confidential information. The regulations are also compatible with the procedural element of the normative framework, in particular, the right of the accused to be assisted by counsel of his own choosing. Despite the fact that the lawyer is primarily instructed by a third party, the lawyer can only accept such instructions with the voluntary and informed consent of the client.

In conclusion, it should be noted that the duty of confidentiality and the concept of legal professional privilege are essential prerequisites for building a fiduciary lawyer-client relationship. With these privileges, however, comes great responsibility. The decisions made by individual lawyers reflect on the legal profession as a whole. Lawyers should therefore at all times be aware that they have to uphold societal trust in the legal profession, which means that lawyers' conduct concerning confidentiality and professional privilege should be carefully supervised. Any abuse of confidentiality or privilege or illegitimate disclosure should be subjected to immediate and strict disciplinary sanctions, without designing regulations which could have a chilling effect on lawyers carrying out their daily practice.

5 The Criminal Defence Lawyer as Spokesperson

The first three roles primarily focus on the criminal defence lawyer's relationship with the accused, but the lawyer also has an important role in relation to society, the media and the court. In this role the criminal defence lawyer acts as a spokesperson for the suspect and accused person. Questions that arose in this respect concerned whether the criminal defence lawyer is free to comment on pending cases in the media and whether he is free to criticise the other participants in proceedings. Moreover, the question arose to what extent do principles of confidentiality, independence and integrity limit the lawyer's appearance in the media?

5.1 Recapitulation of the Normative Framework[79]

According to standing ECtHR case law, free and forceful exchange of arguments between parties should be the norm for any criminal proceedings, based on the general right of freedom of expression as laid down in Article 10 ECHR and Article 11 § 1 EU Charter and the principle of equality of arms. This right is, however, not absolute. The criminal defence lawyer has to be aware of his specific position as an intermediary between the State and the accused. Various interests have to be balanced, such as the right of the public to be informed, the proper administration of justice, and the dignity of the legal profession. This means that he has to take into account the wording of his criticism, the place where he makes his comments (in or outside the courtroom, for example) and the context in which his criticism is expressed. In general, the margins of appreciation are wider when the lawyer expresses his criticism of the counter party in the course of proceedings in court. Moreover, he should ensure that his criticism is strictly professional and relevant in the specific case. Governments may restrict the lawyer's freedom of expression, but should only do so if this is proportionate, relevant and sufficient in the particular circumstances of the case. Too much interference from the authorities with the lawyer's freedom of defence can have an undesirable chilling effect on the defence and should therefore be avoided.

With regard to the lawyer's role as spokesperson in the media, the ECtHR is of the view that lawyers should certainly be allowed to appear in public and comment on the administration of justice, although their criticism has limitations. The secrecy of pending judicial investigation needs to be respected, statements should have a sound factual basis, and should not be insulting to the person to whom the statements are directed. Comments in the media can also be used to the benefit of the accused's case as long as the comments are made in a professional, reserved and neutral manner, so that the right to a fair trial is not

[79] See Chapter 2, para. 2.4 for extensive references to relevant literature and case law.

violated. If the lawyer has good reason to approach the media and make comments while the case is still pending, his conduct should not be subject to disciplinary action in order to avoid the aforementioned possible chilling effect of the effectiveness of the defence.

Concerning the deontological element of the normative framework, the core principles of partiality and integrity are most prominent. The lawyer has to present himself as the partisan representative of the accused when he acts in the media as his client's spokesperson. Furthermore, the criminal defence lawyer has to take into account his client's interests as well as the interests of others, for example victims, involved in the proceedings.

5.2 Regulations in Common

The regulations that were identified concerning the criminal defence lawyer's role as spokesperson showed commonalities regarding the following aspects. First, a regulations was included in the majority of the general codes of conduct (19 in total)[80] that lawyers are not allowed to knowingly deceive or mislead the court by providing false or untrue information. This general restriction, however, does not mean that lawyers do not enjoy considerable freedom to defend their client; this is addressed in the following. Second, the common factors in the different regulations that were identified regarding the lawyer's conduct in the media are that a trial by media has to be avoided and that the lawyer should always act with the interests of his client in mind. Regarding the conditions for commenting in the media, these regulations, however, showed several differences which are also discussed in the following paragraph.

5.3 Differences in Regulations

5.3.1 Freedom of Defence[81]

While lawyers are not allowed to mislead the court or provide false or untrue information, they are allowed to use all legal means to defend the accused, as long as they do not harm the rights and legitimate interests of others (Latvia, the Netherlands, Poland, and Sweden), show appropriate respect to the court, and comments are not made in the media or in public (Estonia). The Dutch regulation is unique in prescribing that criminal defence lawyers' statements can never be held against the accused.[82] Regulations regarding the lawyer's duty

[80] Bulgaria, Croatia, Cyprus, the Czech Republic, England and Wales, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Scotland, Slovakia, Slovenia, and Sweden.
[81] See Chapter 3, para. 3.4.1.
[82] See Chapter 3, para. 2.3.2.

to show respect to the court were identified in 16 general codes of conduct (Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, England and Wales, Finland, Germany, Ireland, Italy, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, and Spain). The Maltese and German regulations are very practical, because they prescribe the lawyer's appropriate attire in court. The remaining regulations use the lawyer's duty to the court as a starting point. They differ in the way this duty is further explained. Lawyers are:

- not allowed to mislead the court (England and Wales);
- obliged to assist the court and safeguard the client's rights and benefits (Slovenia);
- not obliged to comment on incomplete lists of previous convictions (Ireland);
- obliged to act in a moral way, meaning that their conduct needs to be honest, loyal, and respectful (Cyprus, Czech Republic, Lithuania, Luxembourg, Slovakia, and Spain);
- not allowed to make insulting statements or derogatory comments about the judge's decision (Croatia, Italy, and Finland); and
- not allowed to disrupt the normal course of proceedings (Bulgaria, and Denmark).

5.3.2 Making Comments in the Media[83]

The regulations on making comments in the media all concern commenting in the media on cases which are still pending before the court. First, there are regulations which do not prohibit commenting in the media in principle (Austria, Belgium, the Czech Republic, England and Wales, Finland, Germany, Italy, the Netherlands, Poland, and Slovenia). These regulations emphasise that the lawyer has to be aware of the impact comments in the media can have on the client's case and his person. Moreover, the interests of the client should always be paramount, in that respect the German Statements on criminal defence mention prevention of any additional harm to the accused's right to presumption of innocence as an important incentive when commenting in the media.[84] Lawyers will have to be careful about the wording they choose and make sure that their comments are not unnecessarily offensive to third parties. Some regulations explicitly provide that prior client consent is needed before comments can be made in the media (England and Wales (barristers), the Netherlands, Belgium, Austria, Finland, and Italy). Second, there are regulations which explicitly prohibit lawyers from commenting in the media while the case is still pending to prevent trial by media at all costs (Croatia, Cyprus, France, Ireland, Luxembourg, and Malta). Secrecy of the criminal investigation seems to be a crucial component of the regulations of Croatia, France,

[83] See Chapter 3, para. 3.4.2; § 2.3.1.1 on specific regulations for criminal defence lawyers in the Netherlands and para.3.2.6.3 on specific regulations for criminal defence lawyers in England and Wales.
[84] See Chapter 3, para. 2.2.

and Luxembourg, which is why those regulations prohibit lawyers from commenting in the media. Lastly, the Austrian Basic Principles for criminal defence are unique in promoting active use of the media as a defence strategy.[85]

5.4 Synthesis

Regarding the criminal defence lawyer's role as spokesperson, it is noteworthy that most of the regulations identified emphasise that trials by media should be avoided and that lawyers should refrain from knowingly deceiving or misleading the court by providing false information. Other than that, the details of the regulations identified showed considerable differences, which makes any conclusions regarding harmonisation of these regulations virtually impossible. Regarding the compatibility of the regulations with the normative framework, it can be concluded that it is clear from all regulations that the core principle of partiality is upheld, since the regulations all, explicitly or implicitly, instruct the lawyer to always act in the best interests of his client.

6 Final Conclusions

In this research the deontological regulations governing different aspects of the criminal defence lawyer's role when assisting suspects and accused persons in criminal proceedings have been mapped out and analysed for nearly all Member States of the EU. One of the assumptions of this research was that the role and position of criminal defence lawyers in criminal proceedings is closely linked to the organisation of the criminal justice system. While it is common knowledge that the criminal justice systems across the EU show many differences, the assumption was also that the deontological regulations governing the conduct of criminal defence lawyers would also be very different across the EU. This research, however, demonstrated that deontological regulations for (criminal defence) lawyers across the EU share several aspects in common. This is an interesting finding, since the fact that there is some common ground is an important precondition to be able to identify essential components for an EU system of regulations that governs the conduct of criminal defence lawyers. Furthermore, many of the deontological regulations which were identified in this research comply with the normative framework as used in this research. This means that these deontological regulations in principle govern the conduct of criminal defence lawyers in a way that they will be able to conduct an effective defence of the interests of suspects and accused persons.

[85] See Chapter 3, para. 2.1.3.

The normative framework which was used in this research consisted of two elements: minimum procedural safeguards underlying the concept of effective legal assistance as provided by the ECHR, EU Charter and several EU Directives on the one hand and the core principles of the legal profession (independence, partiality, confidentiality, professionalism and integrity) on the other hand. It followed from the structure of this normative framework that the criminal defence lawyer basically has to assume four different roles when defending suspects and accused persons in criminal proceedings, namely the role of legal representative, the role of strategic adviser, the role of trusted counsellor, and the role of spokesperson. Based on the findings of the synthesis presented in this Chapter, it is possible to make recommendations regarding the essential components of an EU system of regulations for criminal defence lawyers. Therewith the research question which was central to this research can be answered:

What should be the essential components for an EU system of regulations governing the conduct of criminal defence lawyers who provide legal assistance to suspects and accused persons in criminal proceedings, taking into account the normative framework of Articles 6, 8 and 10 ECHR, relevant EU law, and the core principles of criminal defence lawyers in order to provide an effective defence?

6.1 Essential Components of the Criminal Defence Lawyer's Role as Legal Representative

According to the right to a fair trial as laid down in, for example, Article 6 ECHR, each suspect and accused person has the right to the assistance of a lawyer. This assistance should be effective, which implies that some restrictions should be placed on the acceptance of criminal cases by the lawyer. The first essential component would therefore be to oblige criminal defence lawyers to only accept a case if they are sufficiently qualified and knowledgeable in the specific legal aspects of that case and have sufficient time to actually conduct the case. At the same time, they should never refuse a case solely based on the character of the accused, the nature of the defence, or the strength of the prosecution's case.

Effectiveness of legal assistance, however, not only depends on the quality of the legal assistance, but is also influenced by the availability of legal aid. According to Article 6 ECHR, legal assistance should be available for each accused, even if they cannot afford to pay for the assistance. Although this research does not address the details of the organisation of criminal legal aid schemes across the EU, it has been noted that legal aid budget cuts throughout the EU have a negative effect on the quality of legal assistance offered to suspects and accused who rely on legal aid. Moreover, this research also illustrated the importance of having sufficient monitoring mechanisms in place regarding the quality of legal

aid providers. The second essential component would therefore address the urgency of sufficient remuneration for legal aid providers and adequate monitoring mechanisms to ensure good quality in legal aid providers.

In his role as legal presentative, the criminal defence lawyer may be confronted with more than one suspect or accused person in the same case. According to the deontological regulations as mapped out in this research, it has become clear that no regulations were found that explicitly prohibit defending co-accused as a matter of principle. As such, it can be concluded that possibility of defending co-accused is commonly accepted throughout the EU. However, the core principles of professional independence, partiality and confidentiality dictate that it is essential that criminal defence lawyers are aware of the risks of defending co-accused with (potentially) conflicting interests. This research identified several regulations that provide specific and practical guidance to criminal defence lawyers on this matter. For example, the criminal defence lawyer should ensure that he fully informs all co-accused of the risks of a joint representation and should only proceed with the explicit, voluntary and unequivocal consent of each co-accused. Regulations also provide clarification to the lawyer on how to recognise (potential) conflicts of interests, such as the fact that the lawyer would provide co-accused with different legal advice or when one of the accused clearly has more superiority. In order to determine whether the interests of the co-accused (potentially) conflict, it is important that the lawyer is able to confer with all accused involved. This implies that the lawyer needs to be granted access to the accused already in the early stages of proceedings. The third essential component therefore needs to provide guidance to criminal defence lawyers when confronted with more than one accused in the same case similar to the findings of this research, but also ensure that the criminal defence lawyer is granted access to all suspects in the earliest stage of proceedings.

The fourth essential component is about legal assistance provided at the police station prior to and during police interrogation. The EU Directive on the right to access to a lawyer in criminal proceedings (2013/48) regulates that the suspect has the right to confer with his lawyer prior to the interrogation and that the lawyer is allowed access during the interrogation. The Directive, however, does not explicitly address the role the lawyer has to fulfil particularly during the interrogation. An EU system of deontological regulations could fill this lacuna by providing guidance to criminal defence lawyers on how to conduct themselves during this specific phase in criminal proceedings. This guidance could include matters such as seeking information on the case file, checking custody conditions, checking whether the suspect needs any practical assistance or medical attention, ensuring that the suspect's right to silence and privilege against self-incrimination are protected during police interrogation, and adopting an active attitude during interrogation, for example by requesting clarification of questions posed, and making remarks when it is clear to the lawyer

that the suspect is unable to continue with the interrogation. The English Code of Practice C to PACE 1984 could serve as inspiration:

> "The solicitor's only role in the police station is to protect and advance the legal rights of their client. On occasions this may require the solicitor to give advice, which has the effect of the client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene in order to seek clarification, challenge an improper question to their client or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice." (Note 6D)

It should be noted at this point that although the organisation of the pre-trial investigative phase will determine how this component will be interpreted in the individual Member States it is important to have at least some level of minimum safeguards to serve as guidance for individual criminal defence lawyers. This is needed in particular in a phase of criminal proceedings when a criminal defence lawyer's assistance is most needed to counterbalance the power of the investigating authorities and ensure a fair trial for the suspect and accused person.

6.2 Essential Components of the Criminal Defence Lawyer's Role as Strategic Adviser

Each suspect and accused person has the right to have adequate time and facilities to properly prepare his defence according to Article 6 § 3 (b) ECHR and EU Directive 2013/48, which are part of the normative framework used in this research. Preparation of the defence is key in the criminal defence lawyer's role as strategic adviser. Adequate and effective preparation of the defence requires sufficient time and proper information about the prosecution's case against the accused. The fifth essential component should provide that the defence has timely and complete access to case materials in the possession of the prosecution which are relevant for the preparation of their case.

The right to silence and the privilege against self-incrimination are important defence rights which have to be safeguarded by the criminal defence lawyer. This research showed that none of the regulations under review provided guidance regarding advising on the right to silence. In order to fill this lacuna, the sixth essential component should refer to the main aspects of deontological challenges that may arise when advising the suspect on his right to silence. Often this advice has to be provided in the earliest stages of criminal proceedings (prior to the police interrogation), while at that stage information on case material is often not readily available. Moreover, there is a risk that adverse inferences may be drawn from the suspect's silence in early stages of the proceedings, even if he invokes silence following

legal advice. The criminal defence lawyer should, however, never be tempted to share the reasons for his legal advice, following the core principles of professional independence and confidentiality. This also means that the suspect or accused persons can never be held accountable for following legal advice on silence.

This research also addressed the practice of (out-of-court) settlements, such as plea bargaining. Settlement proceedings are commonly accepted throughout the EU; however, it raises deontological challenges for criminal defence lawyers, similar to the challenges described regarding legal advice on the right to silence. The fact that the criminal defence lawyer has to advise the accused person at a stage in proceedings when usually not much information on the prosecution's case is available, makes it very difficult for the lawyer to properly advise his client. This research also demonstrated that the regulations regarding advising on settlement proceedings showed significant differences across the EU. It is therefore, at this point, impossible to make specific recommendations regarding an essential component.

Another important source of information that can be used for the preparation of the defence are the results from investigations conducted by the defence. While the collection of technical evidence such as fingerprints and DNA samples might be impossible for the defence lawyer, it is conceivable that the lawyer takes statements from witnesses to be used as evidence in their case. This also relates to the accused's right to examine witnesses or to have them examined as laid down in Article 6 §3 (d) ECHR. As such, the seventh essential component should be that the lawyer is allowed to examine witnesses not only during trial, but also pre-trial in order to collect valuable evidence for his client's case. It has been noted in this research that it requires specific skills to examine witnesses and to take their statements which can be used in evidence. In line with the core principle of professionalism, the eight essential component would therefore be to include regulations which emphasise the necessity of sufficient practical skills training regarding examining witnesses and taking statements. The ninth essential component flows from the core principle of integrity, more specifically the criminal defence lawyer's duty to ensure that the societal and governmental trust in the legal profession is upheld, by reminding the criminal defence lawyer to avoid any appearance of influencing witnesses at all time.

The tenth essential component concerns the fiduciary lawyer-client relationship. The lawyer's duty of confidentiality which flows from the core principle of confidentiality is key in this respect, since it ensures that the lawyer can create an environment allowing the client to entrust him with all the information necessary to properly prepare the defence. However, particularly in cross-border cases, it is essential that any language barriers between the lawyer and client are prevented. According to the EU Directive on interpretation and translation (2010/64), suspects have the right to be able to communicate with their lawyer and if necessary this communication should be interpreted. An EU system of regulations for

criminal defence lawyers should therefore include not only procedural safeguards regarding interpretation and translation, but also that the interpreter or translator adheres to the principle of confidentiality.

6.3 Essential Components of the Criminal Defence Lawyer's Role as Trusted Counsellor

Regarding the criminal defence lawyer's role as trusted counsellor, two main themes were discussed in this research: the duty of confidentiality and the legal concept of professional privilege. It followed from this research that the duty of confidentiality is recognised as a core duty of the lawyer throughout the EU. Evidently, the eleventh essential component should be including reference to this duty of confidentiality as one of the cornerstones of the criminal defence lawyer's conduct. Exceptions to this duty of confidentiality are also commonly accepted throughout the EU and should therefore also form part of the eleventh essential component. Exceptions to confidentiality can, however, only be made with the client's explicit and voluntary consent and when this is in the best interests of the client or when this would prevent serious harm to others. The component should, furthermore, refer to the core principle of professional independence by referring to the criminal defence lawyer's duty to always keep the interests of the defence in mind when confronted with a demand from the client to disclose confidential information.

The legal concept of professional privilege is complementary to the deontological duty of confidentiality. The possibility to invoke legal professional privilege allows criminal defence lawyers to uphold their duty of confidentiality in front of official authorities. This concept is connected to the right to privacy as it is laid down in Article 8 ECHR and Article 7 EU Charter. It is also referred to in Article 4 of the EU Directive on the right to access to a lawyer in criminal proceedings (2013/48). As such, reference to legal professional privilege as a procedural safeguard to protect the confidential and privileged character of certain information forms the twelfth essential component. In particular, an EU system of regulations should refer to the protection of professional privilege when the lawyer's premises are searched. In this research several relevant deontological regulations were identified, which all had in common that they all prescribe the presence of an independent, knowledgeable Bar representative during the search. It is the responsibility of this Bar representative to advise the investigating authorities on the privileged character of the information seized.

The thirteenth essential component is about the acceptance of instructions and/or payment by third parties on behalf of the suspect or accused person. Several deontological regulations were identified in this research, which allowed criminal defence lawyers to be instructed and/or paid by third parties. These regulations had in common that at all times the lawyer should preserve his professional independence and uphold his duty of

confidentiality when accepting instructions from third parties. This means that the criminal defence lawyer will have to ensure that he receives the client's voluntary and explicit consent before taking on representation. Moreover, it means that the criminal defence lawyer should not let himself be forced by the third party to follow a certain line of defence or that he should be persuaded to disclose confidential information in exchange for payment.

6.4 Essential Components of the Criminal Defence Lawyer's Role as Spokesperson

Regarding the criminal defence lawyer's role as spokesperson the first essential component, and therewith the fourteenth essential component in total, would be that the criminal defence lawyer is granted considerable freedom to comment on the administration of justice in a specific case and criticise the conduct of other actors in the proceedings, based on the freedom of speech as stipulated in Article 10 ECHR and Article 11 EU Charter. This freedom should be delineated by the deontological obligation not to knowingly mislead or deceive the court by providing false or untrue information.

The fifteenth and last essential component should deal with the deontological obligation to avoid trials by media. In this research several regulations were identified in the general codes of conduct referring to the (criminal defence) lawyer's duty to refrain from conducting a trial by media. Consequently, the lawyer should be very careful in his decision to comment in the media about pending cases and always consider whether commenting in the media would be in his client's best interests.

6.5 The Essential Components of an EU System of Regulations governing the Conduct of Criminal Defence Lawyers

In the previous paragraphs the relevant regulations for criminal defence lawyers who provide legal assistance to suspects and accused persons in criminal proceedings as they have been identified in the EU Member States were analysed against the normative framework of minimum procedural safeguards underlying an effective defence and the core principles for criminal defence lawyers. This resulted in a package of 15 essential components, which are the basis for an EU system of regulations for criminal defence lawyers. It has been explained in this research that the criminal defence lawyer needs to fulfil 4 roles. These roles include the criminal defence lawyer as the accused persons' legal representative, strategic adviser, trusted counsellor and spokesperson. The 15 essential components as identified in this research in fact paint the contours of these roles fulfilled by a criminal defence lawyer in criminal proceedings.

The Criminal Defence Lawyer as Legal Representative

1. The criminal defence lawyer is obliged to:
    a. only accept a case if he
        i. is sufficiently qualified and knowledgeable in the specific legal aspects of that case; and
        ii. has sufficient time to actually conduct the case.
    b. never refuse a case solely based on the character of the accused, the nature of the defence or the strength of the prosecution's case.
2. The authorities have to ensure sufficient remuneration for legal aid providers and the legal profession needs to provide adequate monitoring mechanisms to ensure good quality in legal aid providers.
3. Defending more than one accused person in the same case is allowed, provided that:
    a. the criminal defence lawyer is able to confidentially confer with each individual accused;
    b. the criminal defence lawyer is granted access to each detained accused at the earliest stages of proceedings;
    c. the criminal defence lawyer fully informs all accused of the risks of joint representation and of the consequences should a conflict of interests arise; and
    d. each accused provides explicit, voluntary and unequivocal consent to the joint representation.
4. The criminal defence lawyer's role when assisting a suspect at the police station, particularly prior to and during police interrogation, is to protect and advance the suspect's legal rights. Therefore, the legal advice provided by the criminal defence lawyer may not always be in the best interests of the criminal investigation. Depending on the specific organisation of pre-trial proceedings, criminal defence lawyers should be provided with guidance on how to fulfil this role. Such guidance could include, for example:
    a. full and timely access to case materials;
    b. checking custody conditions;
    c. checking whether the suspect needs any practical assistance or medical attention;
    d. ensuring that the suspect's right to silence and his privilege against self-incrimination are protected during police interrogation; and
    e. adopting an active attitude during interrogation, for example by requesting clarification of questions posed and making remarks when it is clear to the lawyer that the suspect is unable to continue with the interrogation.

The Criminal Defence Lawyer as Strategic Adviser

5. The criminal defence lawyer and his client are granted timely and complete access to case materials in the possession of the prosecution to the extent that these materials are relevant for the preparation of the defence case.
6. When advising the accused person on exercising his right to silence, the criminal defence lawyer needs to be aware that:
    a. his legal advice is dependent on the level of disclosure of case material;
    b. the authorities may draw inferences from the accused person's silence; and
    c. his duty of confidentiality and his professional privilege dictate the extent to which reasons for legal advice are shared with the authorities.
7. The criminal defence lawyer is allowed to examine witnesses not only during trial, but also pre-trial in order to collect valuable evidence for his client's case.
8. The criminal defence lawyer ensures that he is properly trained and sufficiently skilled in taking statements from witnesses which can be used in evidence.
9. When examining witnesses pre-trial, the criminal defence lawyer avoids any appearance of influencing these witnesses.
10. If necessary, criminal defence lawyers and their clients are assisted by a qualified interpreter during their consultations. This interpreter has a duty of confidentiality regarding the contents of these consultations.

The Criminal Defence Lawyer as Trusted Counsellor

11. The criminal defence lawyer has to keep confidential any information that is shared with him in the context of the case. The criminal defence lawyer always has an independent responsibility to decide whether disclosing confidential information is in the client's best interests. Exceptions to this duty of confidentiality can only be made:
    a. with the client's explicit and voluntary consent;
    b. when this is in the client's best interests; or
    c. to prevent serious harm to others.
12. When the criminal defence lawyer's (professional or private) premises are searched, an independent and knowledgeable representative of the Bar should be present to advise the investigating authorities on the privileged character of any material seized.
13. At all times the criminal defence lawyer preserves his professional independence and upholds his duty of confidentiality when accepting instructions and/or payments from third parties. At least he has to ensure that he receives the client's voluntary and explicit consent beforehand.

The Criminal Defence Lawyer as Spokesperson

14. The criminal defence lawyer is granted considerable freedom to comment on the administration of justice in a specific case and to criticise the conduct of other actors in the proceedings. The criminal defence lawyer should, however, never knowingly mislead or deceive the court by providing false or untrue information.
15. The criminal defence lawyer has a duty to refrain from conducting the case in the media and should always consider whether commenting in the media is in his client's best interests.

7 Concluding Remarks

The research presented in this dissertation has provided sufficient food for thought and debate about the role and position of criminal defence lawyers across the EU. The essential components as they have been identified in the previous paragraph may serve as a catalyst for this debate, because they can challenge legal professionals, scholars and (national and European) legislators to rethink the established relationships between the different actors in criminal proceedings. There is still a lot of work to be done in this field of research, if only to ensure that the defence rights of suspects and accused persons remain in focus and criminal defence lawyers keep being reminded of their crucial contribution to the rule of law and their duties to the proper administration of justice in general and their client's interests in particular. It is, however, also important to stress that any regulations at EU level regarding the conduct of criminal defence lawyers should never have a chilling effect on the criminal defence lawyer's freedom to act. In this closing paragraph, some recommendations are made for future research.

One of the aspects of this field of research which has not yet been addressed fully in this research is the correlation between the organisation of the criminal justice system, legal traditions and cultural differences and the regulations governing the criminal defence lawyer's conduct. In-depth comparative case studies into these aspects will contribute to a better understanding of the relationship between the organisation of criminal justice systems and underlying legal traditions and cultural features and the role and position of the criminal defence lawyer. The results of this research could serve as a starting point for setting up such case studies.

Furthermore, expert meetings between criminal defence lawyers across the EU could be organised to encourage debate and to obtain an even better understanding of the influence of changing criminal procedural environments on the role and position of criminal defence lawyers. In line with such expert meetings, it would be interesting to set up empirical research in this field to investigate the practical implications of the regulations that have been set out in this research and to find answers, if any, to the questions raised.

In addition, further research is recommended into the quality assurance of criminal advocacy in general and legal aid providers in particular. For example, training and qualification of lawyers in general and criminal defence lawyers in particular differ significantly throughout the EU. There are Member States, such as Belgium and the Netherlands, where the training programme is quite strict with only limited room for the candidate to choose his own courses. Other Member States, such as Cyprus and Austria, have hardly any compulsory training elements and each candidate can therefore compose his own training programme. The duration of the training varies from 1 to 5 years and also the entry requirements to start advocacy training differ from sufficient working experience in the legal field to an academic degree in law. The organisation and content of ongoing professional development training programmes also differ between the Member States: CPD programmes are not available in all Member States, and if programmes are available, compliance with these programmes is not always monitored. It would be worth exploring these differences and the contents of the programmes further. Also, it would be interesting to explore whether quality assurance schemes could be developed for criminal defence lawyers in general and criminal legal aid providers in particular on an EU level.

Lastly, the influence of an ever-diminishing legal aid budget on the quality of criminal legal aid cannot be ignored. Similarly, the noticeable move to an increasingly managerialist criminal justice system in some EU Member States[86] and the related consequences for the position of the defence are interesting research subjects for more comparative research. Given the EU's seemingly relentless urge to create a safe and secure society, the role of criminal defence lawyers as watchdogs of the rule of law has become ever more imperative. This calls for continuous research into their role and position in criminal proceedings.

[86] See for example: Ministry of Justice, *Transforming the Criminal Justice System,* Strategy and Action Plan, July 2014, p. 3; J. Rayner, *Transforming summary justice,* Law Society Gazette, 18 May 2015; C. Grayling, *Government response to review of efficiency in criminal proceedings*, 11 March 2015; Ministry of Security and Justice, *Contourennota,* October 2015. See also McEwan 2011 and Holvast & Doornbos 2015.

SUMMARY

Cross-border crime is ever increasing, so that more intensive cooperation between police and judicial authorities of the EU Member States is necessary in order to effectively combat such crime. This also means that criminal defence lawyers will be more and more involved in cross-border defences. Consequently, it is to be expected that criminal defence lawyers will also increasingly cooperate with their peers in other EU Member States. In that regard it is important for criminal defence lawyers to be knowledgeable not only about the criminal procedural regulations of other Member States, but also about the deontological regulations that govern their peers in other Member States. The CCBE Code of Conduct for European Lawyers also refers to these duties by stating in Article 2.4: "When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity."

Chapter 1 introduces the context and aim of the research. This research aims to provide an overview of the deontological regulations relevant for the conduct of criminal defence lawyers across the EU and to determine whether these relevant regulations contribute to an effective defence. To this end, an EU-wide inventory has been made of all rules of conduct that are relevant to criminal defence lawyers who assist suspects in criminal proceedings.

Subsequently, it was researched whether and to what extent these rules contribute to an effective defence by comparing these rules with a normative framework of minimum procedural and deontological safeguards for an effective defence. The following research question is central to this research:

"*What should be the essential components for an EU system of regulations governing the conduct of criminal defence lawyers who provide legal assistance to suspects and accused persons in criminal proceedings, taking into account the normative framework of Articles 6, 8 and 10 ECHR, relevant EU law, and the core principles of criminal defence lawyers in order to provide an effective defence?*"

This central research question has been divided in three sub-research questions, which are elaborated in Chapters 2 through 4:

1. What is the normative framework on a European and an EU level for the regulation of criminal defence lawyers' conduct in providing an effective defence to suspects and accused persons in criminal cases?

2. What deontological regulations, particularly applicable to criminal defence lawyers, can be identified in the EU Member States?
3. What are the differences and similarities between the regulations as identified across the EU? What can be concluded about the compatibility of these regulations with the normative framework?

The normative framework is introduced in **Chapter 2**. This framework consists of two elements: a procedural and a deontological element. The procedural element entails the minimum safeguards which underlie an effective defence on an European and EU level. Taking into account the deontological perspective of this research, a selection of relevant minimum safeguards has been made, namely the right to legal assistance, the right to confidential lawyer-client communication, and the right to freedom of defence. These rights are laid down in Articles 6, 8 and 10 ECHR respectively and in Articles 47, 7 and 11 EU Charter respectively. Lastly, a number of EU Directives are also relevant to the procedural element of the normative framework, namely Directive 2013/48 on the right to the assistance of a lawyer in criminal proceedings, Directive 2010/64 on the right to interpretation and translation, Directive 2016/1919 on the right to legal aid, and Directive 2012/13 on the right to information. These regulations are further elaborated in case law of the ECtHR and the CJEU; relevant case law is incorporated in the procedural element of the normative framework.

The deontological element of the normative framework is formed by five professional core principles: partiality, independence, confidentiality, professionalism and integrity. These core principles can be found in several European and international documents, such as the IBA Principles, the Havana Principles, the European Code of Conduct for Lawyers, and the European Charter for the Legal Profession of the CCBE. Since the normative framework concerns core principles, also the national codes of conducts for lawyers in the EU Member States all refer to these principles.

Both elements are necessary to create the normative framework. Indeed, the criminal defence lawyer need not only be knowledgeable in the minimum procedural safeguards that constitute an effective defence, he also must take into consideration the core principles when making decisions with regard to the defence of his clients. The combination of these two elements led to a division of the criminal defence lawyer's job description into four roles, namely the role of legal representative, the role of strategic adviser, the role of trusted counsellor, and the role of spokesperson. These roles are the red line in this manuscript.

The relevant rules of conduct for criminal defence lawyers are mapped out in **Chapter 3**. These rules were identified in specific sets of deontological regulations for criminal defence lawyers and in general codes of conduct for the legal profession in the EU Member States.

The selection of relevant rules of conduct has been made using the roles mentioned above as a starting point. In order to properly analyse the rules of conduct, the roles have been further divided into several aspects. The role of legal representative has been broken down into the acceptance of and withdrawal from a case, the issue of *dominus litis*, defending co-accused, quality assurance, and legal representation on the basis of legal aid. The role of strategic adviser includes the right to information and (defence) disclosure, advising on right to silence and (out-of-court) settlement, contacting witnesses, the use of an interpreter, and keeping the client informed. The role of trusted counsellor has been broken down into three aspects, namely the duty of confidentiality, legal professional privilege, and sharing information with third parties. Lastly, the role of spokesperson includes the freedom of defence and conduct in court and in the media.

In 4 EU Member States specific sets of deontological regulations for criminal defence lawyers have been identified: Austria, Germany, the Netherlands and the United Kingdom (more specifically in England and Wales and Scotland). These sets of regulations are specifically written for lawyers who practise criminal defence and should be read in conjunction with the general codes of conduct. The German regulations are the most elaborate, consisting of 76 statements, each of which includes elaborate guidance. The Austrian and Scottish regulations are less extensive with 13 and 14 principles and guidance respectively. The English regulations are laid down in several separate documents providing specific practice-based guidance to solicitors and barristers who provide legal assistance to suspects and accused persons in criminal proceedings. The Dutch regulations not only contain rules of conduct, but also pay specific attention to procedural safeguards and guarantees which have to be offered by the Government to ensure that criminal defence lawyers are able to provide an effective defence to their clients.

In addition to the specific sets of regulations mentioned above, protocols governing the conduct of lawyers assisting suspects in police stations particularly prior to and during police interrogation were identified in 4 EU Member States (the *Salduz* protocols). These protocols were found in Belgium, France, the Netherlands and in the United Kingdom (more specifically in England and Wales). The role and position of the criminal defence lawyer in the first phase of criminal proceedings is becoming increasingly important and the *Salduz* protocols provide the lawyer with guidance in order to effectively fulfil his role in this crucial phase of the proceedings to ensure that defence rights are properly safeguarded.

Lastly, relevant rules of conduct were identified in the general codes of conduct in at least 13 EU Member States, namely Belgium (Flanders and Wallonia), Croatia, Cyprus, Estonia, France, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Slovenia, Sweden, and the United Kingdom (more specifically England and Wales (barristers), Ireland (solicitors and barristers), and Scotland (solicitors). These relevant rules have all been detailed in Chapter 3.

The research results from Chapter 3 were analysed and tested against the normative framework to determine whether the existing relevant rules of conduct contributed to an effective defence. This analysis and synthesis is presented in **Chapter 4**. The regulations were compared to determine differences and commonalities. Interestingly, despite the fact that criminal justice systems differ across the EU, the rules of conduct identified show several commonalities. Regarding the criminal defence lawyer's role and position prior to and during police interrogation, for example, all regulations identified provide that the suspect has the right to confer with his lawyer in confidence prior to the interrogation. Moreover, all regulations prescribe that the lawyer has to adopt an active and flexible attitude during the interrogation.

The codes of conduct of all EU Member States provide regulations prescribing that the lawyer should only accept a case if he is sufficiently qualified to conduct the case and if he is able on a practical level to give his full attention to the case. This also means that all lawyers are obliged to keep their knowledge and skills up to date. The regulations which specifically apply to criminal defence lawyers, moreover, prescribe that a criminal defence lawyer is never allowed to refuse a case due to public opinion, his own belief, the suspect's character, the nature of the offence, a plea of guilty, or the strength of the prosecution's case. Additionally, the relevant regulations show many commonalities when it concerns withdrawal from a case. All the rules identified prescribe that the lawyer always needs to prioritise the interests of his client. Moreover, assisting co-accused is allowed by the regulations identified, as long as there are no conflicting interests. The regulations regarding legal assistance on the basis of legal aid also show many similarities. All regulations oblige the lawyer to inform his client about the possibility of legal aid, but at the same time the regulations do not oblige the lawyer to apply for legal aid on his own initiative. Another similarity was found regarding the regulations on informing the client about the progress of the case. All regulations prescribe that the lawyer is obliged to keep the client informed about the progress of the case, even if the client himself does not request to be informed. Concerning advising on the right to silence, interestingly none of the regulations provide any guidance, despite this being an important part of the criminal defence lawyer's work, particularly in his role as strategic adviser. Furthermore, the duty of confidentiality is mentioned in all codes of conduct by obliging lawyers to keep confidential any information that is shared with him in the context of the case that he is handling. This duty of confidentiality has to be upheld, also after the lawyer-client relationship has ended and also after the client has died. Moreover, if the lawyer has employees, they will also be bound by a derived duty of confidentiality. The duty of confidentiality is, however, not absolute and therefore almost all regulations also allow for exceptions to this duty. Lastly, there were also some similarities in the regulations governing the criminal defence lawyer's role as spokesperson. All regulations prohibit the lawyer from providing the court with information

which he knows is misleading or false. Moreover, all regulations use the starting point that a lawyer should avoid 'trials by media'. The proceedings have to take place in court, not in the media.

Obviously, also several differences were established between the relevant regulations. For example, in some EU Member States the regulations make a difference between chosen and appointed lawyers concerning the regulation regarding withdrawal from a case. Furthermore, the regulations regarding the issue of *dominus litis* show some differences. On the one hand there are regulations which emphasise that the client is *dominus litis*, while other regulations prescribe that the lawyer has the last say in determining the defence strategy. Moreover, there are regulations which make a distinction between the factual and the legal elements of the case. According to these regulations, the client is in charge of the factual side of the case, while the lawyer is in charge of the legal aspects. For a detailed overview of all relevant deontological regulations for criminal defence lawyers, reference is made to Chapter 3.

Lastly, there were also two regulations identified in this research which are arguably not compatible with the normative framework. It could be argued therefore that these regulations do not contribute to an effective defence. In the Netherlands a regulation was identified which prohibits any contact between the lawyer and his client for a certain period of time during criminal proceedings. According to these regulations a substitute lawyer is appointed, but in practice this substitute lawyer is unable to provide an effective defence. The second regulation was identified in Belgium (Wallonia) and in Luxembourg. This regulation explicitly prohibits lawyers from contacting witnesses pre-trial. Only in very exceptional circumstances is the lawyer allowed to contact a witness, but only in writing.

In the end, 15 essential components for an EU system of regulations for criminal defence lawyers could be distilled from the synthesis and analysis of the relevant deontological regulations as presented in Chapter 4. Together these 15 essential components form the basis for a system of deontological regulations for criminal defence lawyers at EU level. These components actually clarify the contours of the four roles that the criminal defence lawyer fulfils when assisting suspects and accused persons in criminal proceedings:

The Criminal Defence Lawyer as Legal Representative

1. The criminal defence lawyer is obliged to:
    a. only accept a case if he
        i. is sufficiently qualified and knowledgeable in the specific legal aspects of that case; and
        ii. has sufficient time to actually conduct the case.

   b. never refuse a case solely based on the character of the accused, the nature of the defence or the strength of the prosecution's case.
2. The authorities have to ensure sufficient remuneration for legal aid providers and the legal profession needs to provide adequate monitoring mechanisms to ensure good quality in legal aid providers.
3. Defending more than one accused person in the same case is allowed, provided that:
   a. the criminal defence lawyer is able to confidentially confer with each individual accused;
   b. the criminal defence lawyer is granted access to each detained accused at the earliest stages of proceedings;
   c. the criminal defence lawyer fully informs all accused of the risks of joint representation and of the consequences should a conflict of interests arise; and
   d. each accused provides explicit, voluntary and unequivocal consent to the joint representation.
4. The criminal defence lawyer's role when assisting a suspect at the police station, particularly prior to and during police interrogation, is to protect and advance the suspect's legal rights. Therefore, the legal advice provided by the criminal defence lawyer may not always be in the best interests of the criminal investigation. Depending on the specific organisation of pre-trial proceedings, criminal defence lawyers should be provided with guidance on how to fulfil this role. Such guidance could include, for example:
   a. full and timely access to case materials;
   b. checking custody conditions;
   c. checking whether the suspect needs any practical assistance or medical attention;
   d. ensuring that the suspect's right to silence and his privilege against self-incrimination are protected during police interrogation; and
   e. adopting an active attitude during interrogation, for example by requesting clarification of questions posed and making remarks when it is clear to the lawyer that the suspect is unable to continue with the interrogation.

The Criminal Defence Lawyer as Strategic Adviser

5. The criminal defence lawyer and his client are granted timely and complete access to case materials in the possession of the prosecution to the extent that these materials are relevant for the preparation of the defence case.
6. When advising the accused person on exercising his right to silence, the criminal defence lawyer needs to be aware that:
   a. his legal advice is dependent on the level of disclosure of case material;
   b. the authorities may draw inferences from the accused person's silence; and

c. his duty of confidentiality and his professional privilege dictate the extent to which reasons for legal advice are shared with the authorities.

7. The criminal defence lawyer is allowed to examine witnesses not only during trial, but also pre-trial in order to collect valuable evidence for his client's case.
8. The criminal defence lawyer ensures that he is properly trained and sufficiently skilled in taking statements from witnesses which can be used in evidence.
9. When examining witnesses pre-trial, the criminal defence lawyer avoids any appearance of influencing these witnesses.
10. If necessary, criminal defence lawyers and their clients are assisted by a qualified interpreter during their consultations. This interpreter has a duty of confidentiality regarding the contents of these consultations.

The Criminal Defence Lawyer as Trusted Counsellor

11. The criminal defence lawyer has to keep confidential any information that is shared with him in the context of the case. The criminal defence lawyer always has an independent responsibility to decide whether disclosing confidential information is in the client's best interests. Exceptions to this duty of confidentiality can only be made:
    a. with the client's explicit and voluntary consent;
    b. when this is in the client's best interests; or
    c. to prevent serious harm to others.
12. When the criminal defence lawyer's (professional or private) premises are searched, an independent and knowledgeable representative of the Bar should be present to advise the investigating authorities on the privileged character of any material seized.
13. At all times the criminal defence lawyer preserves his professional independence and upholds his duty of confidentiality when accepting instructions and/or payments from third parties. At least he has to ensure that he receives the client's voluntary and explicit consent beforehand.

The Criminal Defence Lawyer as Spokesperson

14. The criminal defence lawyer is granted considerable freedom to comment on the administration of justice in a specific case and to criticise the conduct of other actors in the proceedings. The criminal defence lawyer should, however, never knowingly mislead or deceive the court by providing false or untrue information.
15. The criminal defence lawyer has a duty to refrain from conducting the case in the media and should always consider whether commenting in the media is in his client's best interests.

Given the relentless urge of Governments throughout the EU to create safe societies, the role of criminal lawyers as watchdogs of the rule of law has become increasingly urgent. This research provides sufficient material for reflection on the role and position of criminal lawyers within the EU. The essential components as defined in this research can serve as a catalyst for future debate, by challenging criminal lawyers, academics and (both national and European) legislators to reconsider the existing role and position of the actors in criminal procedure. There is much additional research to be done in this regard, such as more in-depth research into the correlation between the role and position of the criminal lawyer and the criminal justice system in which he works; the practical implications of the rules of conduct as they are identified in this research and quality assurance of criminal defence lawyers and of legal aid providers in particular. Additional research would serve not only to ensure that criminal defence lawyers are reminded of their crucial contribution to the rule of law, but also of their duties to the fair administration of criminal justice in general and to their clients in particular.

SAMENVATTING

Grensoverschrijdende criminaliteit neemt toe, wat een intensieve samenwerking tussen de politieapparaten en justitiële autoriteiten van de verschillende lidstaten noodzakelijk maakt om deze criminaliteit effectief te bestrijden. Van strafrechtadvocaten wordt dan ook in toenemende mate verwacht dat ze in staat zijn om hun cliënten in grensoverschrijdende zaken bij te staan. Te verwachten is dus dat er steeds meer grensoverschrijdende samenwerking tussen strafrechtadvocaten zal plaatsvinden. Om die reden is het van belang dat strafrechtadvocaten niet alleen op de hoogte zijn van de strafprocessuele regelgeving in het land waar ze hun cliënt moeten verdedigen, maar ook dat zij goed op de hoogte zijn van de toepasselijke gedragsregels. Ook de CCBE Gedragscode voor Europese advocaten verwijst hier naar in artikel 2.4: "Wanneer een advocaat grensoverschrijdend optreedt, dan kan deze advocaat verplicht worden zich ook te houden aan de gedragsregels die gelden in de lidstaat waar hij te gast is. Advocaten hebben daarom een verplichting zich te informeren over de regels die hun zullen beïnvloeden bij de uitoefening van specifieke taken."

In **hoofdstuk 1** wordt de context en het doel van dit onderzoek toegelicht. Dit onderzoek heeft tot doel de verschillende binnen de EU geldende gedragsregels voor strafrechtadvocaten uitgebreid in kaart te brengen en te toetsen of deze regels bijdragen aan een effectieve verdediging. Daartoe is een EU brede inventarisatie gemaakt van alle gedragsregels die relevant zijn voor strafrechtadvocaten die verdachten bijstaan in het strafproces. Vervolgens is onderzocht of en in hoeverre deze regels bijdragen aan een effectieve verdediging door deze regels af te zetten tegen een normatief kader van minimum procedurele en gedragsrechtelijke waarborgen voor een effectieve verdediging. In dit onderzoek staat de volgende onderzoeksvraag centraal:

"Wat zouden de essentiële componenten moeten zijn voor een EU systeem van regelingen welke het gedrag van strafrechtadvocaten die rechtsbijstand bieden aan verdachten in het strafproces sturen, met inachtneming van het normatieve kader dat gevormd wordt door de artikelen 6, 8 en 10 EVRM, relevante EU regelgeving en de kernwaarden voor strafrechtadvocaten met het oog op het bieden van een effectieve verdediging?"

Deze centrale onderzoeksvraag is opgedeeld in drie deelvragen, welke verder worden uitgewerkt in hoofdstukken 2 tot en met 4:

1. Wat is het normatieve kader op Europees en EU niveau voor de regulering van het gedrag van strafrechtadvocaten om te komen tot een effectieve verdediging van verdachten in het strafproces?
2. Bestaan er specifieke (sets van) regelingen die speciaal zijn opgesteld voor strafrechtadvocaten binnen de EU lidstaten? Zijn er voor strafrechtadvocaten specifieke regelingen opgenomen in de algemene gedragscodes voor advocaten in de EU lidstaten?
3. Wat zijn de verschillen en overeenkomsten tussen de verschillende regelingen binnen de EU lidstaten? Zijn deze regelingen verenigbaar met het normatieve kader?

In **hoofdstuk 2** wordt het normatieve kader uiteengezet. Dit kader is opgebouwd uit twee elementen: een procedureel en een gedragsrechtelijk element. Het procedurele element betreft de minimale vereisten die op Europees en EU niveau gesteld worden aan een effectieve verdediging. Er is – met het oog op het gedragsrechtelijke perspectief van dit onderzoek – een selectie gemaakt van relevante minimumvereisten, te weten het recht op rechtsbijstand, het recht op vertrouwelijke communicatie tussen de advocaat en zijn cliënt en het recht op vrijheid van verdediging. Deze rechten zijn respectievelijk terug te vinden in artikel 6, artikel 8 en artikel 10 EVRM. Bovendien zijn deze rechten vastgelegd in het EU Handvest (respectievelijk artikel 47, artikel 7 en artikel 11 EU Handvest). Tot slot zijn voor het normatief kader nog een aantal EU Richtlijnen van belang, te weten richtlijn 2013/48 over het recht op rechtsbijstand in strafzaken, richtlijn 2010/64 over het recht op een tolk en vertaling van stukken, richtlijn 2016/1919 over het recht op gefinancierde rechtsbijstand en richtlijn 2012/13 over het recht op informatie. Deze regelgeving is uitgewerkt in rechtspraak van het EHRM en het Hof van Justitie-EU; relevante uitspraken zijn verwerkt in het procedurele element van het normatief kader.

Het gedragsrechtelijke element van het normatieve kader wordt gevormd door de vijf professionele kernwaarden, te weten partijdigheid, onafhankelijkheid, vertrouwelijkheid, professionaliteit en integriteit. Deze kernwaarden zijn op Europees en internationaal niveau in verschillende documenten terug te vinden, zoals de IBA Principles, de Havana Principles, de Europese gedragscode voor advocaten en het Europees handvest van kernwaarden voor de juridische beroepen van de CCBE. Aangezien het hier kernwaarden betreft, verwijzen ook alle algemene gedragscodes voor advocaten van de EU lidstaten naar deze waarden.

Beide elementen zijn noodzakelijk om een compleet normatief kader te vormen. Immers, de advocaat moet niet alleen op de hoogte zijn van de minimale procedurele waarborgen

die bijdragen aan een effectieve verdediging, bij het nemen van beslissingen in het belang van de effectieve verdediging van zijn cliënt dient hij tevens zijn professionele kernwaarden in ogenschouw te nemen.

De combinatie van deze twee elementen heeft geleid tot een onderverdeling van de taakopvatting van de strafrechtadvocaat in vier verschillende rollen, namelijk de rol van rechtsbijstandverlener (*legal representative*), strategisch adviseur (*strategic adviser*), vertrouwenspersoon (*trusted counsellor*) en vertegenwoordiger (*spokesperson*). Deze verdeling in verschillende rollen vormt de rode draad door dit proefschrift.

In **hoofdstuk 3** wordt uitgebreid ingegaan op de relevante gedragsregels voor strafrechtadvocaten, zoals deze neergelegd zijn in enerzijds specifieke (sets van) regelingen voor strafrechtadvocaten en anderzijds in de algemene gedragscodes voor advocaten in de EU lidstaten. De selectie van relevante gedragsregels is gemaakt aan de hand van de vier bovengenoemde rollen, welke voor een goede analyse verder zijn onderverdeeld in verschillende aspecten. Bij de rol van rechtsbijstandverlener gaat het dan om het accepteren van en het zich terugtrekken uit een zaak, de vraag wie de leiding heeft over de verdediging (*dominus litis* kwestie), het bijstaan van medeverdachten, kwaliteitsborging en de gefinancierde rechtsbijstand. Bij de rol van strategisch adviseur zijn van belang het recht op informatie en toegang tot het procesdossier, het adviseren over het zwijgrecht en buitengerechtelijke afdoening, het contacteren van getuigen voor de zitting, het inzetten van een tolk tijdens overleggen met de cliënt en het op de hoogte houden van de cliënt. De rol van vertrouwenspersoon is onderverdeeld in de geheimhoudingsplicht, het verschoningsrecht en het delen van informatie met derden. De rol van vertegenwoordiger, ten slotte, omvat de vrijheid van verdediging en de opstelling van de strafrechtadvocaat in de media en ten overstaan van de rechter.

In vier EU lidstaten zijn specifieke sets van gedragsrechtelijke regelingen voor strafrechtadvocaten aangetroffen: Duitsland, Nederland, Oostenrijk en het Verenigd Koninkrijk (meer specifiek in Engeland en Wales en Schotland). Het gaat hierbij om aparte gedragscodes specifiek opgesteld voor strafrechtadvocaten, waarbij opgemerkt moet worden dat deze regelingen altijd in samenhang met de algemene gedragscodes voor advocaten gelezen moeten worden. De Duitse regeling is zeer uitgebreid, bestaande uit 76 stellingen met ieder een uitgebreide toelichting. De Oostenrijkse en Schotse regeling daarentegen zijn minder omvangrijk, respectievelijk 13 en 14 stellingen met toelichting. De Engelse regelingen zijn vastgelegd in diverse afzonderlijke documenten, welke praktijkgerichte handreikingen bieden voor *solicitors* en *barristers* die rechtsbijstand verlenen aan verdachten in strafzaken. De Nederlandse regeling besteedt niet alleen aandacht aan gedragsregels voor strafrechtadvocaten, maar omvat ook garanties en

waarborgen gericht tot de overheid die tot doel hebben de strafrechtadvocaat voldoende gelegenheid en ruimte te bieden zijn taak effectief te kunnen uitoefenen.

Naast bovengenoemde specifieke regelingen zijn in vier EU lidstaten protocollen gevonden die specifiek van toepassing zijn op de rol van de advocaat voorafgaande en tijdens het politieverhoor (de zogenaamde Salduz-protocollen). Dergelijke protocollen zijn geïdentificeerd in België, Frankrijk, Nederland en het Verenigd Koninkrijk (meer specifiek Engeland en Wales). De positie en rol van de strafrechtadvocaat in de eerste fase van het strafproces wordt steeds prominenter en de protocollen geven de advocaat richting om zijn rol in deze cruciale fase zo effectief mogelijk te vervullen, zodat de verdedigingsrechten van de verdachte ook in deze vroege fase van het strafproces gewaarborgd worden.

Tot slot zijn er relevante gedragsregels geïdentificeerd in de algemene gedragscodes voor advocaten in tenminste dertien EU lidstaten, te weten België (Vlaanderen en Wallonië), Cyprus, Estland, Frankrijk, Italië, Kroatië, Letland, Litouwen, Luxemburg, Nederland, Slovenië, het Verenigd Koninkrijk (Engeland en Wales – *barristers*, Ierland – *solicitors* en *barristers* en Schotland – *solicitors*) en Zweden. Deze regels zijn allemaal gedetailleerd uitgewerkt in hoofdstuk 3.

In **hoofdstuk 4** worden de onderzoeksresultaten uit hoofdstuk 3 geanalyseerd en afgezet tegen het normatieve kader om te bepalen of de bestaande relevante regels bijdragen aan een effectieve verdediging of daaraan juist in de weg staan. De regels zijn met elkaar vergeleken om overeenkomsten en verschillen te kunnen vaststellen. Daarbij valt op dat ondanks dat de strafprocedures in de EU lidstaten zeer verschillend georganiseerd zijn, binnen de relevante gedragsregels toch een aantal overeenkomsten kan worden vastgesteld. Ten aanzien van de rol van de advocaat voor en tijdens het politieverhoor geven bijvoorbeeld alle regelingen aan dat de verdachte recht heeft op een vertrouwelijk overleg met de advocaat voorafgaande aan het verhoor. Verder schrijven alle regelingen voor dat de advocaat een actieve en flexibele houding moet aannemen tijdens het verhoor.

De gedragscodes in alle lidstaten voorzien in een regeling dat een advocaat een zaak enkel mag accepteren als hij daartoe voldoende gekwalificeerd is en er geen praktische belemmeringen zijn om de zaak naar behoren te behandelen. Daar hoort bij dat advocaten verplicht zijn hun kennis actueel te houden. De regelingen die specifiek van toepassing zijn op strafrechtadvocaten bepalen bovendien allemaal dat een advocaat een zaak niet mag weigeren op grond van publieke opinie, zijn eigen overtuiging, de persoon van de verdachte, de aard van het misdrijf, een eventuele schuldbekentenis van de verdachte of de hoeveelheid bewijs die de vervolgende instantie tegen de verdachte heeft. Daarnaast komen de regelingen in de kern overeen als het gaat om het zich terugtrekken uit een zaak. Een advocaat zal in dat geval volgens alle regelingen altijd de belangen van de cliënt voorop moeten stellen. Ook het bijstaan van meerdere cliënten in één zaak wordt door de regelingen

toegestaan, zolang er geen sprake is van tegenstrijdige belangen. Ook als het gaat om het bijstaan van verdachten op basis van gefinancierde rechtsbijstand vertonen de regelingen veel overeenkomsten. Alle regelingen verplichten de advocaat om zijn cliënt te informeren over de mogelijkheid van gefinancierde rechtsbijstand, maar tegelijkertijd verplicht geen enkele regeling de advocaat om zelf gefinancierde rechtsbijstand aan te vragen als dat mogelijk is. Nog een overeenkomst tussen de regelingen betreft het op de hoogte houden van de cliënt over de voortgang van de zaak. Volgens de regelingen dient de advocaat de cliënt op de hoogte te houden van de voortgang van de zaak, ook als de cliënt hier zelf niet expliciet om vraagt. Als het gaat om adviseren over het zwijgrecht valt op dat geen enkele regeling hier naar verwijst, terwijl dit toch een zeer belangrijk onderdeel is van het werk van de strafrechtadvocaat, vooral in zijn rol als strategisch adviseur.

De geheimhoudingsplicht komt in alle gedragscodes aan bod, in die zin dat de advocaat tot geheimhouding verplicht is ten aanzien van alles wat hem ter ore komt in het kader van de zaak. Deze geheimhoudingsplicht blijft bestaan ook nadat de relatie met de cliënt is beëindigd. Bovendien hebben de eventuele medewerkers van de advocaat een afgeleide geheimhoudingsplicht. De geheimhoudingsplicht is echter niet absoluut en daarom voorzien vrijwel alle regelingen ook in bepalingen die hierop uitzonderingen toelaten.

Tot slot, zijn er overeenkomsten gevonden in de regelingen die zien op het gedrag van de advocaat in zijn rol als vertegenwoordiger. Alle regelingen geven aan dat het de advocaat verboden is om bewust misleidende of foutieve informatie te verstrekken aan de autoriteiten. Bovendien is het uitgangspunt van alle regelingen dat de advocaat '*trial by media*' dient te vermijden. Het proces dient plaats te vinden in de rechtszaal, niet in de media.

Uiteraard zijn er ook de nodige verschillen geconstateerd tussen de regelingen. Zo wordt in sommige lidstaten bijvoorbeeld een onderscheid gemaakt tussen gekozen en toegevoegde advocaten als het gaat om zich te mogen terugtrekken uit een zaak. Ook ten aanzien van de kwestie van *dominus litis* zijn er verschillen tussen de regelingen. Aan de ene kant zijn er regelingen die benadrukken dat de cliënt de baas is over zijn zaak, daar staan tegenover de regelingen die de advocaat de rol van *dominus litis* toebedelen. Bovendien zijn er regelingen die een onderscheid maken tussen de juridische en feitelijke kant van een zaak, waarbij de advocaat de leiding heeft over het juridische gedeelte, terwijl de cliënt de leiding heeft over het meer feitelijk gedeelte van de zaak. Voor een meer gedetailleerd overzicht van de verschillen tussen de regelingen wordt verwezen naar hoofdstuk 3.

Tot slot is er een tweetal regelingen naar voren gekomen in dit onderzoek, waarvan beargumenteerd kan worden dat deze niet bijdragen aan een effectieve verdediging. Zo bestaat in Nederland een regeling op basis waarvan het contact tussen de verdachte en zijn advocaat tijdelijk kan worden verboden. Er wordt dan weliswaar een vervangende advocaat aangewezen om de verdachte bij te staan, maar gebleken is dat dit onvoldoende tegemoet

komt aan de vereisten van een effectieve verdediging. Een andere regeling die in strijd geacht kan worden met het recht op een effectieve verdediging betreft de regelingen die gevonden zijn in België (Wallonië) en Luxemburg die het de advocaat expliciet verbieden enig contact te hebben met getuigen voorafgaande aan de terechtzitting. Slechts in zeer uitzonderlijke omstandigheden mag de advocaat contact hebben met de getuige, maar dit mag alleen maar schriftelijk.

Nadat alle relevante gedragsregels in kaart gebracht zijn, met elkaar zijn vergeleken waardoor de overeenkomsten en verschillen vastgesteld zijn en alle regelingen zijn geanalyseerd door ze te vergelijken met het normatief kader, is de uitkomst van dit onderzoek dat er in totaal vijftien essentiële bouwstenen kunnen worden gedestilleerd die samen het fundament vormen van een mogelijk systeem van regelingen die het gedrag van strafrechtadvocaten reguleren op EU niveau. Met deze bouwstenen worden als het ware de contouren duidelijk van de vier rollen die de strafrechtadvocaat vervuld in zijn taakuitoefening:

De strafrechtadvocaat als rechtsbijstandverlener

1. De strafrechtadvocaat mag
    a. een zaak alleen aannemen indien hij
        i. voldoende gekwalificeerd en kundig is ten aanzien van de specifieke juridische aspecten van de zaak; en
        ii. voldoende tijd heeft om de zaak naar behoren te behandelen.
    b. een zaak nooit weigeren enkel op basis van het karakter van de verdachte, de aard van de verdediging of de hoeveelheid bewijs tegen de verdachte.
2. De overheid dient te zorgen voor toereikende vergoedingen voor gefinancierde rechtsbijstand en de beroepsgroep dient te voorzien in adequaat toezicht om de kwaliteit van (toegevoegde) rechtsbijstandverleners te waarborgen.
3. Verdediging van meer dan één verdachte in dezelfde zaak is toegestaan mits
    a. de strafrechtadvocaat in staat wordt gesteld met iedere verdachte afzonderlijk en in vertrouwen te overleggen;
    b. de strafrechtadvocaat zo vroeg mogelijk in het proces toegang wordt verleend tot iedere verdachte;
    c. de strafrechtadvocaat iedere verdachte volledig informeert ten aanzien van de risico's van een gezamenlijke verdediging en van de gevolgen indien er een belangenconflict ontstaat; en
    d. iedere verdachte uitdrukkelijk, vrijwillig en ondubbelzinnig toestemming verleent tot het voeren van een gezamenlijke verdediging.

4. De rol van de strafrechtadvocaat die de verdachte bijstaat op het politiebureau, specifiek voorafgaande en tijdens het politieverhoor, is gericht op het waarborgen van de verdedigingsrechten van de verdachte. Dit betekent dat het juridisch advies dat de strafrechtadvocaat aan zijn cliënt geeft, niet altijd in het voordeel van het strafrechtelijk onderzoek hoeft te zijn. Het hangt af van de organisatie van het voorbereidend onderzoek welke gedragsregels voor strafrechtadvocaten in dit verband geformuleerd moeten worden. Zulke regels kunnen bijvoorbeeld inhouden
    a. volledige en tijdige toegang tot het procesdossier;
    b. controleren van de omstandigheden van de voorlopige hechtenis;
    c. controleren of de verdachte praktische ondersteuning of medische aandacht nodig heeft;
    d. zorgen dat het zwijgrecht en het verbod op zelfincriminatie nageleefd worden tijdens het politieverhoor; en
    e. een actieve houding aannemen tijdens het politieverhoor, bijvoorbeeld door het verzoeken om verduidelijking van gestelde vragen of het maken van opmerkingen als de advocaat ziet dat de verdachte niet meer in staat is om het verhoor voort te zetten.

De strafrechtadvocaat als strategisch adviseur

5. De strafrechtadvocaat en zijn cliënt hebben tijdig en volledig toegang tot het procesdossier dat in het bezit is van de vervolgende instantie. In ieder geval krijgen ze toegang tot alle documenten die relevant zijn voor de voorbereiding van de zaak van de verdachte.
6. Wanneer de strafrechtadvocaat de verdachte adviseert ten aanzien van zijn zwijgrecht, dient hij er rekening mee te houden dat
    a. zijn juridisch advies afhankelijk is van de mate waarin hij op de hoogte is van de zaak van de vervolgende instantie;
    b. de autoriteiten nadelige conclusies kunnen trekken uit het zwijgen van de verdachte; en
    c. zijn geheimhoudingsplicht en zijn verschoningsrecht dicteren in hoeverre hij de redenen voor zijn juridisch advies mag delen met de autoriteiten.
7. Het is de strafrechtadvocaat toegestaan om niet alleen in de rechtszaal getuigen te ondervragen maar ook voorafgaande aan de terechtzitting, zodat hij bewijs kan verzamelen ter ondersteuning van de zaak van zijn cliënt.
8. De strafrechtadvocaat zorgt er voor dat hij voldoende getraind en vaardig is om verklaringen van getuigen te nemen, zodat deze ook gebruikt kunnen als bewijs in de strafzaak van zijn cliënt.

9. Wanneer de advocaat getuigen ondervraagt voorafgaande aan de terechtzitting, dan moet hij ten alle tijden voorkomen dat hij ook maar de schijn opwekt dat hij getuigen heeft beïnvloed.
10. Indien noodzakelijk, worden strafrechtadvocaten en hun cliënten tijdens hun overleg bijgestaan door een gekwalificeerde tolk. Ook deze tolk heeft een geheimhoudingsplicht, zodat het vertrouwelijk karakter van het overleg gewaarborgd blijft.

De strafrechtadvocaat als vertrouwenspersoon

11. De strafrechtadvocaat dient alle informatie die met hem gedeeld wordt in het kader van een strafzaak vertrouwelijk te behandelen. Hij heeft altijd een eigen verantwoordelijkheid om te beslissen of het openbaar maken van vertrouwelijke informatie in het belang van de verdachte is. Uitzonderingen op de geheimhoudingsplicht kunnen enkel gemaakt worden op voorwaarde dat
    a. de cliënt uitdrukkelijk en vrijwillig toestemming heeft verleend;
    b. openbaarmaking in het belang van de verdachte is; of
    c. omdat openbaarmaking noodzakelijk is om schade aan derden te voorkomen.
12. Wanneer het kantoor of het huis van de strafrechtadvocaat doorzocht wordt, dient er altijd een onafhankelijke en kundige vertegenwoordiger van de orde aanwezig te zijn. Deze vertegenwoordiger adviseert de opsporingsautoriteiten over de toepassing van het verschoningsrecht op de inbeslaggenomen voorwerpen.
13. Ten alle tijden waarborgt de strafrechtadvocaat zijn professionele onafhankelijkheid en geheimhoudingsplicht wanneer hij een zaak of betaling voor zijn diensten accepteert met tussenkomst van een derde. Op zijn minst dient hij zich ervan te vergewissen dat de cliënt vrijwillig en uitdrukkelijk instemt met zijn rechtsbijstandverlening.

De strafrechtadvocaat als vertegenwoordiger

14. De strafrechtadvocaat geniet aanzienlijke vrijheid om kritiek te uiten op de rechtsgang in een specifieke zaak en op de houding van de andere procesdeelnemers. Het is de strafrechtadvocaat echter niet toegestaan om willens en wetens de rechter te misleiden of onjuiste of onware informatie te verstrekken.
15. De strafrechtadvocaat dient zoveel mogelijk te vermijden dat het proces in de media wordt gevoerd en moet steeds de belangen van zijn cliënt in het oog houden wanneer er overwogen wordt om zich tot de media te wenden.

Gezien de niet aflatende drang van overheden om een veilige samenleving te creëren, is de rol van strafrechtadvocaten als waakhonden van de rechtsstaat steeds urgenter geworden. Dit onderzoek biedt voldoende stof tot nadenken over de rol en positie van

strafrechtadvocaten binnen de grenzen van de EU. De essentiële bouwstenen zoals deze in dit onderzoek zijn vastgesteld kunnen als katalysator dienen voor toekomstig debat, door strafrechtadvocaten, wetenschappers en (zowel nationale als Europese) wetgevers uit te dagen de bestaande rol en positie van de actoren in het strafprocesrecht opnieuw tegen het licht te houden. Er is in dit verband nog veel aanvullend onderzoek te doen (zoals meer diepgaand onderzoek naar de correlatie tussen de rol en positie van de strafrechtadvocaat en het strafprocessuele systeem waarin hij werkt; de praktische implicaties van de gedragsregels zoals ze zijn geïdentificeerd in dit onderzoek en kwaliteitsborging van strafrechtadvocaten en van toegevoegde rechtsbijstand in het bijzonder), al was het maar om te zorgen dat de verdedigingsrechten van verdachten in beeld blijven en strafrechtadvocaten herinnerd blijven aan hun cruciale bijdrage aan de rechtsstaat en hun plichten aan een goede strafrechtbedeling in het algemeen en aan hun cliënten in het bijzonder.

SELECTED BIBLIOGRAPHY

Alge 2013

D. Alge, "The Effectiveness of Incentives to Reduce the Risk of Moral Hazard", *Legal Ethics* (2013), Vol. 16, Iss. 1, pp. 162-181

Attinger 2011

M. Attinger, "Het tuchtrecht voor advocaten", in: J. Boksem et al. (ed.), *Handboek Strafzaken*, Deventer: Wolters Kluwer, 2011, Chapter 2

Bannier 2011

F. Bannier, *Zoals een behoorlijk advocaat betaamt,* Apeldoorn-Antwerp: Maklu, 2011

Bannier 2015

F. Bannier, *Zoals een behoorlijk advocaat betaamt,* Apeldoorn-Antwerp: Maklu, 2015

Barendrecht et al. 2014

M. Barendrecht, L. Kistemaker, H. Scholten, R. Schrader & M. Wrzesinska, *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (report), WODC, Feb. 2014 (published online)

Barkhuysen et al. 2011

T. Barkhuysen, A. Bos & F. ten Have, "Een verkenning van de betekenis van het Handvest van de Grondrechten van de Europese Unie voor het privaatrecht", *Nederlands Tijdschrift voor Burgerlijk Recht* (2011), Iss. 10, No. 76 (*NTBR* 2011/76)

Barkhuysen et al. 2015

T. Barkhuysen, Th. Boersema, J. Soeteman, J. Vlieger & L. Aarts, *Duurzaam stelsel gefinancierde rechtsbijstand* (Final report), 2 Dec. 2015

Bauw et al. 2016

E. Bauw, B. Böhler & M. Westerveld, *Togadragers in de rechtsstaat – De juridische professies en de toegang tot het recht*, The Hague: Boom Juridische Uitgevers, 2016

Beck 1992

C. Beck, *Thesen zur Strafverteidigung*, Schriftenreihe der Bundesrechtsanwaltskammer – Band 8, München: Beck'sche Verlagsbuchhandlung, 1992

Blackstock et al. 2014

J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova & T. Spronken, *Inside Police Custody – An Empirical Account of Suspects' Rights in Four Jurisdictions*, Cambridge, Antwerp, Portland: Intersentia, 2014

Boekman 2007

S. Boekman (edited by F. Bannier), *Advocatentuchtrecht*, Deventer: Wolters Kluwer, 2007

Boekman 2012

S. Boekman (edited by F. Bannier), *Advocatentuchtrecht,* Deventer: Wolters Kluwer, 2012

De Boer & Boezelman 2015

J. de Boer & G. Boezelman, "Beperking of handicap?", *Strafblad* (Nov. 2015), pp. 393-402

Böhm 2014

I. Böhm, "Verdacht onder een vergrootglas", *Advocatenblad* (2014), Iss. 9, pp. 40-43

Böhler 2017

B. Böhler, *De goede advocaat*, Amsterdam: Cossee, 2017

Boksem 2007

J. Boksem, *Met raad en daad: Gedachten over de positie van de verdediger in strafzaken*, inaugural lecture Maastricht University, Deventer: Wolters Kluwer, 2 March 2007

Boksem 2013

J. Boksem, "Alles of niets in het belang van de verdachte?", *Strafblad* (Nov. 2013), pp. 381-390

Boon 2014

A. Boon, *The Ethics and Conduct of Lawyers in England and Wales*, Oxford and Portland, Oregon: Hart Publishing, 2014

Brants & Spronken 2007

C. Brants & T. Spronken, *Het professionele verschoningsrecht: de arts, de advocaat en de journalist in de Nederlandse strafpraktijk*, preadvies Nederlands-Vlaamse Vereniging voor Strafrecht, Tilburg: Wolf Legal Publishers, 2007

Brants & Stapert 2004

C. Brants & B. Stapert, *Voor wat hoort wat: plea bargaining in het strafrecht*, The Hague: Boom Juridische Uitgevers, 2004

Bridges 2006

L. Bridges, "The Ethics of Representation on Guilty Pleas", *Legal Ethics* (2006), Vol. 9, Iss. 1, pp. 80-100

Bridges & Cape 2008

L. Bridges and E. Cape, *CDS Direct: Flying in the face of the evidence*, in: Evidence based policy series, Centre for Crime and Justice Studies, London, Oct. 2008

Buisman 2011

S. Buisman, "The Influence of the European Legislator on the National Criminal Law of Member States: It is All in the Combination Chosen", *Utrecht Law Review* (2011), Vol. 7, Iss. 3, pp. 137-155

de Búrca 2011

G. de Búrca, "The Road not taken: The European Union as a Global Human Rights Actor", *American Journal of International Law* (2011), Vol. 105, Iss. 4, pp. 649-693

Buruma 2011

Y. Buruma, "Het advocatenprivilege bedreigd", *Delikt en Delinkwent* (2011), Vol. 1, No. 7

Cape 2006-I

E. Cape, "Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers", *Legal Ethics* (2006), Vol. 9, Iss. 1, pp. 56-79

Cape 2006-II

E. Cape, *Defending Suspects at Police Stations: the practitioner's guide to advice and representation*, London: Legal Action Group, 2006

Cape 2006-III

E. Cape, *Police Station Advice – Advising on Silence*, Law Society Criminal Law Committee, Criminal Practitioners' Newsletter January 2006 (Special Edition), No. 63

Cape et al. 2007

E. Cape, J. Hodgson, T. Prakken & T. Spronken, *Suspects in Europe*, Antwerp: Intersentia, 2007

Cape & Young 2008

E. Cape & R. Young (eds.), *Regulating Policing – The Police and Criminal Evidence Act 1984 Past, Present and Future*, Oxford and Portland, Oregon: Hart Publishing 2008

Cape et al. 2010

E. Cape, J. Hodgson, R. Smith & T. Spronken, *Effective Criminal Defence in Europe,* Antwerp: Intersentia, 2010

Cape 2012

E. Cape, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals*, New York: Open Society Foundations, 2012

Cape & Namoradze 2012

E. Cape & Z. Namoradze, *Effective Criminal Defence in Eastern Europe*, Moldova: Soros Foundation, 2012

Cape 2013

E. Cape, *Designing out Defence Lawyers,* in: No Defence: Lawyers and Miscarriages of Justice, Solicitors Journal - Justice Gap Series, London, 2013, pp. 14-17.

Cape & Hodgson 2014

E. Cape & J. Hodgson, "The Right of Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice", *New Journal of European Criminal Law* (2014), Vol. 5, Iss. 4, pp. 450-479

Cape 2015

E. Cape, "Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?", *Criminal Law Review* (2015), Iss. 1, pp. 47-66

Cape & Smith 2016

E. Cape & T. Smith, *The practice of pre-trial detention in England and Wales*: Research report, Bristol: The University of West England, 2016

Clementi 2004

D. Clementi, *Review of the regulatory framework for legal services in England and Wales* (final report), Dec. 2014

Cownie et al. 2013

F. Cownie, A. Bradney & M. Burton, *English Legal System in Context*, Oxford: Oxford University Press, 2013

Crijns et al 2016

J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality* (Research report), Eleven International Publishing 2016

Damaška 1973

M. Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study", *University of Pennsylvania Law Review* (1973), Vol. 121, Iss. 3, pp. 506-589

Damaška 1975

M. Damaška, "Structures of Authority and Comparative Criminal Procedure", *Yale Law Journal* (1975), Vol. 84, Iss. 3, pp. 480-544

Damaška 1975-II

M. Damaška, "Presentation of evidence and factfinding precision", *University of Pennsylvania Law Review* (1975), Vol. 123, Iss. 41, pp. 1083-1106

Damaška 1986

M. Damaška, *The Faces of Justice and State Authority*, New Haven and London: Yale University Press, 1986

Doctors van Leeuwen 2010

A. Doctors van Leeuwen, *Het bestaande is geen alternatief. Een verkenning naar verbeteringen in het toezicht op de advocatuur*, Nederlandse School voor Openbaar Bestuur: (report) March 2010

Dreissen 2007

W. Dreissen, *Bewijsmotivering in strafzaken,* dissertation Maastricht University, The Hague: Boom Juridische Uitgevers, 6 Sept. 2007

Flood & Hviid 2013

J. Flood & M. Hviid, *The cab rank rule: its meaning and purpose in the new legal services market*, Report for the Legal Services Board, 2013

Flynn et al. 2016

A. Flynn, J. Hodgson, J. McCulloch & B. Naylor, "Legal aid and access to legal representation: redefining the right to a fair trial", *Melbourne University Law Review* (2016), Vol. 40, Iss. 1

Franken 2007

A. Franken, "Traditionele waarden van de advocatuur en schuivende verantwoordelijkheden voor de raadsman: achtergronden bij een verhit debat over", *Delikt en Delinkwent* (2007), Iss. 4, No. 27 (*DD* 2007/27)

Franken 2010

A. Franken, "Beperkingen", *Delikt en Delinkwent* (2010), Iss. 8, No. 58 (*DD* 2010/58)

Franken 2011

A. Franken, "Media en strafrechter", *Delikt en Delinkwent* (2011), Iss. 5, No. 34 (*DD* 2011/34)

Franken 2011-I

A. Franken, "Dominus Litis", *Delikt en Delinkwent* (2011), Iss. 10, No. 79 (*DD* 2011/79)

Franken & Van Kampen 2013

A. Franken & P. van Kampen, "Een herbezinning op de rol van de raadsman in het vooronderzoek", in: M. Groenhuijsen en T. Kooijmans (ed.), *Roosachtig strafrecht, liber amicorum Theo de Roos*, Deventer: Wolters Kluwer 2013, pp. 235-248

Garland & McEwan 2012

F. Garland & J. McEwan, "Embracing the overriding objective: difficulties and dilemmas in the new criminal climate", *International Journal of Evidence and Proof* (2012), Vol. 16, pp. 233-262

Goldstein Bolocan 2002

M. Goldstein Bolocan (ed.), *Professional Legal Ethics: a Comparative Perspective*, CEELI Concept Paper Series, Washington D.C., 8 July 2002

Goriely 1992

T. Goriely, "Legal Aid in the Netherlands: A View from England", *The Modern Law Review* (1992), Vol. 55, No. 6, pp. 803-821

Gross 2011

Rt Hon. Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (report), Sept. 2011

Gross & Treacy 2012

Rt Hon. Lord Justice Gross and Rt Hon. Lord Justice Treacy, *Further review of disclosure in criminal proceedings: sanctions for disclosure failure* (report), Judiciary of England and Wales, Nov. 2012

Harris, O'Boyle and Warbrick 2014

D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights,* Oxford: Oxford University Press, 2014

Haverkate 2016

G. Haverkate, "Het decemberarrest over de verhoorbijstand", *Nederlands Juristenblad* (2016), Vol. 91, Iss. 11, pp. 745-748 (*NJB* 2016/555)

Heger 2011

M. Heger, "Influences of EU Law on National Criminal Law"*, US-China Law Review* (2011), Vol. 8, Iss. 3, pp. 263-271

Heringa 2010

A. Heringa, "European Legal Education: The Maastricht Experience", *Penn State International Law Review* (2010), Vol. 29, Iss. 1, pp. 81-94

Hodgson 2011

J. Hodgson, "Safeguarding Suspects' Rights in Europe: A Comparative Perspective", Legal Studies Research Paper No. 2011-11, University of Warwick School of Law, *New Criminal Law Review* (2011), Vol. 14, No. 4, pp. 611-665

Holvast & Doornbos 2015

N.L. Holvast and N. Doornbos, "Exit, Voice, and Loyalty within the Judiciary: Judges' Responses to New Managerialism in the Netherlands", *Utrecht Law Review* (2015), Vol. 11, Iss. 2, pp. 49-63

Hunter et al. 2018

G. Hunter, J. Jacobson & A. Kirby, *Judicial Perceptions of the Quality of Criminal Advocacy* (report of research commissioned by the SRA and the BSB), Institute for Criminal Policy Research, Birkbeck, University of London, June 2018

Jeffrey 2014

Sir Bill Jeffrey, *Review of Independent Criminal Advocacy in England and Wales* (report), May 2014

Jimeno-Bulnes 2010

M. Jimeno-Bulnes, *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?*, Centre for European Policy Studies (CEPS) 'Liberty and Security in Europe', Feb. 2010

Van Kampen & Van der Meij 2016

P. van Kampen & P. van der Meij, "Verhoorbijstand in een rechtstaat", *Nederlands Juristenblad* (2016), Vol. 91, Iss. 11, pp. 738-744 (*NJB* 2016/554)

Kentridge 2013

Sir Sydney Kentridge QC, *The cab rank rule, A response to the Report commissioned by the Legal Services Board*, 4 March 2013

Klip 2012

A. Klip, *European Criminal Law. An Integrative Approach*, Antwerp: Intersentia, 2012

Komárek 2008

J. Komárek, "Case Comment: Legal Professional Privilege and the EU's Fight against Money Laundering", *Civil Justice Quarterly* (2008), Vol. 27

Landsman 2016

M. Landsman, "annotation for Supreme Court 22 December 2015, ECLI:NL:HR:2015:3608", *Jurisprudentie in Nederland* (2016), Iss. 2, No. 40 (*JIN* 2016/40)

Leveson 2015

Sir Brian Levenson, *Review of Efficiency in Criminal Proceedings,* Judiciary of England and Wales, Jan. 2015

McConville et al. 1994

M. McConville, J. Hodgson, L. Bridges & A. Pavlovic, *Standing Accused. The organisation and practices of criminal defence lawyers in Britain*, Oxford: Oxford University Press, 1994

McConville & Marsh 2015

M. McConville & L. Marsh, "Adversarialism goes West: Case management in criminal courts", *International Journal of Evidence and Proof* (2015), Vol. 19, Iss. 3, pp. 172-189

McEwan 2011

J. McEwan, "From adversarialism to managerialism: criminal justice in transition", *Legal Studies* (2011), Vol. 31, Iss. 4, pp. 519-546

McEwan 2013

J. McEwan, "Truth, Efficiency, and Cooperation in Modern Criminal Justice", *Current Legal Problems* (2013), Vol. 66, pp. 203-232

McLaren, Ulyatt & Knowles 2013

M. McLaren, C. Ulyatt & C. Knowles, *The "cab rank rule": a fresh view*, 28 Feb. 2013

Mols 2016

G.P.M.F. Mols, "annotation for Dutch Supreme Court 22 December 2016, ECLI:NL:HR:2015:3608", *Nieuwsbrief Strafrecht* (2016), Iss. 1, No. 1 (*NBSTRAF* 2016/1)

Nijboer 2005

J.F. Nijboer, *Comparative Criminal Law and Procedure – An Introduction*, Deventer: Wolters Kluwer, 2005

Ölcer 2015

F.P. Ölcer, "annotation for Ibrahim v. United Kingdom, ECtHR 16 December 2014, ECLI:CE:ECHR:2016:0913JUD005054108", *European Human Rights Cases* (2015), Iss. 3, No. 58 (*EHRC* 2015/58)

O'Neill 2011

M. O'Neill, "A Europe That Protects: Moving to the Next Stage of Cross-Border Law Enforcement Cooperation", *Police Journal* (2011), Vol. 84, Iss. 2, pp. 125-150

Owusu-Bempah 2013

A. Owusu-Bempah, "Defence participation through pre-trial disclosure: Iss.s and implications", *International Journal of Evidence and Proof* (2013), Vol. 17, Iss. 2, pp. 183-201

Partington 2015

M. Partington, *Introduction to the English Legal System 2015-2016*, Oxford: Oxford University Press, 2015

Pattenden & Skinns 2010

R. Pattenden & L. Skinns, *Choice,* "Privacy and Publicly Funded Legal Advice at Police Stations", *Modern Law Review* (2010), Vol. 73, Iss. 3, pp. 349-370

Peters et al. 2016

S. Peters, M. van Gammeren-Zoeteweij and L. Combrink-Kuiters, *Monitor Gesubsidieerde Rechtsbijstand 2015,* Oisterwijk: Wolf Legal Publishers, July 2016

Pinsler 2002

J. Pinsler, "New Twists in Legal Professional Privilege: Communications for the Purpose of Litigation and Between the Lawyer and Client", *Singapore Academy of Law Journal* (2002), Vol. 14, pp. 195-230

Pivaty 2019

A. Pivaty, *Criminal defence at the police station: a comparative and empirical study*, dissertation Maastricht University, Abingdon: Routledge, 3 May 2019

Prakken & Spronken 2009

T. Prakken & T. Spronken (ed.), *Handboek Verdediging*, Deventer: Wolters Kluwer, 2009

Quirk 2013

H. Quirk, "The right of silence and undermining legal representation at the police station", in: J. Robins (ed.) *No Defence: lawyers and miscarriages of justice*, London: Justice Gap Series (2013), pp. 48-51

Quirk 2013-I

H. Quirk, "Twenty years on, the right of silence and legal advice: the spiralling costs of an unfair exchange", *Northern Ireland Legal Quarterly* (2013), Vol. 64, Iss. 4, pp. 465-484

Raes & Claessens 2012

K. Raes & B. Claessens (eds.), *Towards a new ethical framework for a legal profession in transition?*, Antwerp, Oxford, New York: Intersentia, 2002

Reneman 2010

M. Reneman, "Het Handvest van de grondrechten van de Europese Unie: mogelijke betekenis voor het vreemdelingenrecht", *Asiel & Migrantenrecht* (2010), No. 5 & 6, pp. 233-244

Rivlin 2015

His Honour Geoffrey Rivlin QC, *Criminal Justice, Advocacy and the Bar* (report), Criminal Justice Reform Group, March 2015

Roos 1991

Th.A. De Roos, *Verdediging van belangen: het belang van de verdediging. Enkele principiële en praktische vragen over de rol van de verdediging in strafzaken*, inaugural lecture Maastricht University, Arnhem: Gouda Quint, 22 Nov. 1991

Rueschemeyer 1973

D. Rueschemeyer, *Lawyers and their Society. A Comparative Study of the Legal Profession in Germany and in the United States*, Cambridge: Harvard University Press, 1973

Schumann et al. 2012

S. Schumann, K. Bruckmüller & R. Soyer (eds.), *Pre-trial Emergency Defence*, Schriftenreihe der Vereinigung Österreichischer StrafverteidigerInnen – Band 16, Vienna: Neuer Wissenschaftlicher Verlag, 2012

Seneviratne 2015

M. Seneviratne, "The Legal Ombudsman – Past, Present and Future", *Nottingham Law Journal* (2015), Vol. 24, pp. 1-18

Shaughsnessy 2002

P. Shaughnessy, "The New EU Money-Laundering Directive: Lawyers as Gate-Keepers and Whistle-Blowers", *Law and Policy in International Business* (2002), Vol. 34, pp. 25-44

Sieberson 2008

S. Sieberson, "The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit", *Columbia Journal of European Law* (2008), Vol. 14, Iss. 3, pp. 445-466

Slapper & Kelly 2006

G. Slapper & D. Kelly, *The English Legal System*, Cornwall: TJ International, Padstow, 2006

Slapper & Kelly 2014

G. Slapper & D. Kelly, *The English Legal System*, London: Routledge, 2014

Smith 2010

T. Smith, *The Zealous Advocate in the 21st Century: Concepts and Conflicts for the Criminal Defence Lawyer*, dissertation University of the West of England, Bristol, Aug. 2010

Smith 2013

T. Smith, "Trust, Choice and Money: Why the Legal Aid Reform "U-turn" is Essential for Effective Criminal Defence", *Criminal Law Review* (2013), Iss. 11, pp. 906-913

Smith 2013-I

T. Smith, "The 'quiet revolution' in criminal defence: how the zealous advocate slipped into the shadow", *International Journal of the Legal Profession* (2013), Vol. 20, No. 1, pp. 111-137

Soo 2012

A. Soo, *Remedies against ineffectiveness of defense counsel. Judicial supervision over the performance of defense counsel in Estonian criminal proceedings*, dissertation Tartu University, Tartu: Tartu University Press, 26 Jan. 2012

Soo 2016

A. Soo, "Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October2013) and its Output in National Legislation", *European Criminal Law Review* (2016), Vol. 6, Iss. 3, pp. 284-307

Soo 2017

A. Soo, "Article 12 of the Directive 2013/48/eu: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel", *European Journal of Crime, Criminal Law and Criminal Justice* (2017), Vol. 25, pp. 31-51

Soo 2017-I

A. Soo, "Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13th of September 2016)", *European Journal of Crime, Criminal Law and Criminal Justice* (2017), Vol. 25, pp. 327-346

Soo 2017-II

A. Soo, "How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer?", *New Journal of European Criminal Law* (2017), Vol. 8, Iss. 1, pp. 64–76

Spronken 2001

T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken*, dissertation Maastricht University, Deventer: Wolters Kluwer, 20 April 2001

Spronken & Prakken 2001

T. Spronken & E. Prakken, "Grondslagen van het recht op verdediging", in: C. Brants, P. Mevis & E.Prakken (eds.), *Legitieme strafvordering, Rechten van de Mens als inspiratie in de 21e eeuw*, Antwerp: Intersentia Rechtswetenschappen, 2001, pp. 57-74

Spronken 2003

T. Spronken, *A place of greater safety*, inaugural lecture Maastricht University, Deventer: Wolters Kluwer, 10 Oct. 2003

Spronken 2004

T. Spronken, "Domina litis van de verdediging: een kroniek", in: A. Klip, A. Smeulers, M. Wolleswinkel (eds.), *KriTies: Liber amicorum et amicarum voor prof. mr. E. Prakken*, Deventer: Wolters Kluwer, 2004, pp. 7-17

Spronken & Attinger 2005

T. Spronken & M. Attinger, *Procedural rights in criminal proceedings: Existing level of safeguards in the European Union* (report), European Commission, Dec. 2005

Spronken et al. 2007

T. Spronken, J. Fermon & M. Attinger, "Gedragsrechtelijke dilemma's in de zaak-Holleeder. Over tegenstrijdige belangen, geheimhouding, onafhankelijkheid en vertrouwen in de advocatuur", *Advocatenblad* (2007), Vol. 87, Iss. 3, pp. 78-82

Spronken 2009

T. Spronken, "Ja, de zon komt op voor de raadsman bij het politieverhoor!", *Nederlands Juristenblad* (2009), Iss. 2, pp. 94-100

Spronken & Fermon 2009

T. Spronken & J. Fermon, "Protection of Attorney-Cliënt Privilege in Europe", *Penn State International Law Review* (2008), Vol. 28, Iss. 2, pp. 439-463

Spronken et al. 2009

T. Spronken, G. Vermeulen, D. de Vocht & L. van Puyenbroek, *EU Procedural Rights in Criminal Proceedings*, Antwerp: Maklu, 2009

Spronken 2010

T. Spronken, *EU-Wide Letter of Rights in Criminal Proceedings: Towards Best Practice (report)*, European Commission, July 2010

Stevens & Verhoeven 2010

L. Stevens & W. Verhoeven, *Raadsman bij politieverhoor - Invloed van voorafgaande consultatie en aanwezigheid van raadslieden op de organisatie en wijze van verhoren en de proceshouding van verdachten* (report), WODC, Rotterdam, Aug. 2010 (published online)

Stevens 2010

L. Stevens, "Strafzaken in het nieuws", *Nederlands Juristenblad* (2010), Iss. 11, pp. 660-665 (*NJB* 2010/545)

Tak 2012

P. Tak, *Kostenveroordeling in strafzaken – Een rechtsvergelijkend onderzoek naar de veroordeling van de verdachte in de proceskosten in Duitsland en Engeland* (report), WODC, Nijmegen, July 2012 (published online)

Temminck Tuinstra 2009

J. Temminck Tuinstra, *Defence Counsel in International Criminal Law*, dissertation University of Amsterdam, The Hague: T.M.C. Asser Press, 30 Jan. 2009

Thomas et al. 2016

M. Thomas et al., *Snel, Betekenisvol en Zorgvuldig - Een tussenevaluatie van de ZSM-werkwijze* (report), WODC, Utrecht, April 2016 (published online)

Thommen & Samadi 2016

M. Thommen & M. Samadi, "The Bigger the Crime, the Smaller the Chance of a Fair Trial", *European Journal of Crime, Criminal Law and Criminal Justice* (2016), Vol. 24, Iss. 1, pp. 65-86

Toney 2002

R.J. Toney, "English criminal procedure under Article 6 of the European Convention on Human Rights: Implications for custodial interrogation practices", *Houston Journal of International Law* (2002), Vol. 24, Iss. 3, pp. 411-474

Transform Justice 2016

Transform Justice, *Justice denied? The experience of unrepresented defendants in the criminal courts* (report), April 2016 (published online)

Vanderhallen et al. 2014

M. Vanderhallen, A. de Jong, H. Nelen & T. Spronken, *Rechtsbijstand en de waarde van het verhoor – Een studie naar de te verwachten gevolgen op de verklaringsbereidheid en de opsporing en bewijsvoering in strafzaken van het verlenen van rechtsbijstand voorafgaand en tijdens het verhoor* (report), WODC, Maastricht, Feb. 2014 (published online)

Verkijk 2010

R. Verkijk, *De advocaat in het burgerlijk proces*, dissertation Maastricht University, The Hague: Boom Juridische Uitgevers, 8 Oct. 2010

Vermeulen 2012

G. Vermeulen (ed.), *Defence Rights – International and European Developments*, Antwerp: Maklu, 2012

De Vocht 2009

D. de Vocht, *Verdediging in transitie – Rechtsbijstand in strafzaken in post-communistisch Polen,* dissertation Maastricht University, Nijmegen: Wolf Legal Publishers, 13 Feb. 2009

Ward 2015

J. Ward, "Transforming 'summary justice' through police-led prosecution and 'virtual courts'", *British Journal of Criminology* (2015), Vol. 55, pp. 341-358.

Westerveld 2008

M. Westerveld, *Is sociale rechtshulp van gisteren?,* inaugural lecture University of Amsterdam, Amsterdam: Vossius Press, 2 Oct. 2008

Wheat 1998

K. Wheat, "Lawyers, Confidentiality and Public and Private Interests", *Legal Ethics* (1998), Vol. 1, No. 2, pp. 184-200

Wilde 2015

B. de Wilde, *Stille getuigen: Het recht belastende getuigen in strafzaken te ondervragen (artikel 6 lid 3 sub d EVRM)*, dissertation Vrije Universiteit Amsterdam, Deventer: Wolters Kluwer, 13 April 2015

Wolfsen 2015

A. Wolfsen, *Herijking rechtsbijstand: Naar een duurzaam stelsel voor de gesubsidieerde rechtsbijstand* (report), 30 November 2015 (published online)

Zander 2007

M. Zander, *Cases and Materials on the English Legal System*, Cambridge: University Press, 2007

Zander 2012

M. Zander, *PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future*, London: Law Society Economy Working Papers, 1/2012

CASE LAW

European Court of Justice

CJEU 18 May 1982, C-155/79, ECLI:EU:C:1982:157 (*AM & S/Commission*)
CJEU 26 June 2007, C-305/05, ECLI:EU:C:2007:383 (*Ordre des barreaux francophones et germanophone et al./Conseil des Ministres*)
CJEU 14 September 2010, C-550/07, ECLI:EU:C:2010:512 (*Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd/Commission*)

Opinion of Advocate General Léger, 10 July 2001, C-309/99, ECLI:EU:C:2001:390 (*Wouters and Others/Algemene Raad van de Nederlandse Orde van Advocaten*)
Opinion of Advocate General Poiares Maduro, 14 December 2006, C-305/05, ECLI:EU:C:2006:788 (*Ordre des barreaux francophones et germanophone et al. v Conseil des Ministres*)

European Commission of Human Rights

ECmHR 29 May 1975, ECLI:CE:ECHR:1975:0529DEC000618573 (*X/Austria*)
ECmHR 12 October 1978, ECLI:CE:ECHR:1978:1012DEC000790977 (*X and Y/Austria*)
ECmHR 15 October 1980, ECLI:CE:ECHR:1980:1015DEC000840378 (*Jespers/Belgium*)
ECmHR 30 June 1997, ECLI:CE:ECHR:1999:1221JUD002660295 (*W.R./Austria*)
ECmHR 14 January 1998, ECLI:CE:ECHR:1998:0114DEC002904595 (*Mahler/Germany*)

European Court of Human Rights

ECtHR 6 September 1978, ECLI:CE:ECHR:1978:0906JUD000502971 (*Klass and others/Germany*)
ECtHR 28 November 1978, ECLI:CE:ECHR:1980:0310JUD000621073 (*Luedicke, Belkacem and Koç/Germany*)
ECtHR 9 October 1979, ECLI:CE:ECHR:1981:0206JUD000628973 (*Airey/Ireland*)
ECtHR 13 May 1980, ECLI:CE:ECHR:1980:0513JUD000669474 (*Artico/Italy*)
ECtHR 25 April 1983, ECLI:CE:ECHR:1983:0425JUD000839878 (*Pakelli/Germany*)
ECtHR 2 August 1984, ECLI:CE:ECHR:1984:0802JUD000869179 (*Malone/UK*)
ECtHR 30 September 1985, ECLI:CE:ECHR:1985:0930JUD000930081 (*Can/Austria*)
ECtHR 24 November 1986, ECLI:CE:ECHR:1986:1124JUD000912080 (*Unterpertinger/Austria*)
ECtHR 20 June 1988, ECLI:CE:ECHR:1988:0620JUD001136885 (*Schönenberger and Durmaz/Switzerland*)
ECtHR 19 December 1989, ECLI:CE:ECHR:1989:1219JUD000978382 (*Kamasinski/Austria*)
ECtHR (GC) 21 January 1991, ECLI:CE:ECHR:1999:0121JUD002610395 (*Van Geyseghem/Belgium*)

ECtHR 24 May 1991, ECLI:CE:ECHR:1991:0524JUD001274487 (*Quaranta/Switzerland*)
ECtHR 25 March 1992, ECLI:CE:ECHR:1992:0325JUD001359088 (*Campbell/UK*)
ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001361188 (*Croissant/Germany*)
ECtHR 25 September 1992, ECLI:CE:ECHR:1992:0925JUD001319187 (*Pham Hoang/France*)
ECtHR 16 December 1992, ECLI:CE:ECHR:1992:1216JUD001371088 (*Niemietz/Germany*)
ECtHR 25 February 1993, ECLI:CE:ECHR:1993:0225JUD001082884 (*Funke/France*)
ECtHR 21 September 1993, ECLI:CE:ECHR:1993:0921JUD001235086 (*Kremzow/Austria*)
ECtHR 24 November 1993, ECLI:CE:ECHR:1993:1124JUD001397288 (*Imbrioscia/Switzerland*)
ECtHR 22 September 1994, ECLI:CE:ECHR:1994:0922JUD001673790 (*Pelladoah/the Netherlands*)
ECtHR (GC) 8 February 1996, ECLI:CE:ECHR:1996:0208JUD001873191 (*John Murray/UK*)
ECtHR 26 March 1996, ECLI:CE:ECHR:1996:0326JUD002052492 (*Doorson/the Netherlands*)
ECtHR (GC) 10 June 1996, ECLI:CE:ECHR:1996:0610JUD001938092 (*Benham/UK*)
ECtHR 17 (GC) December 1996, ECLI:CE:ECHR:1996:1217JUD001918791 (*Saunders/UK*)
ECtHR 18 March 1997, ECLI:CE:ECHR:1997:0318JUD002220993 (*Foucher/France*)
ECtHR 25 June 1997, ECLI:CE:ECHR:1997:0625JUD002060592 (*Halford/UK*)
ECtHR 29 August 1997, ECLI:CE:ECHR:1997:0829JUD002271493 (*Worm/Austria*)
ECtHR (GC) 25 November 1997, ECLI:CE:ECHR:1997:1125JUD001895491 (*Zana/Turkey*)
ECtHR 25 March 1998, ECLI:CE:ECHR:1998:0325JUD002322494 (*Kopp/Switzerland*)
ECtHR 21 April 1998, ECLI:CE:ECHR:1998:0421JUD002260093 (*Daud/Portugal*)
ECtHR 20 May 1998, ECLI:CE:ECHR:1998:0520JUD002540594 (*Schöpfer/Switzerland*)
ECtHR 8 June 1998, ECLI:CE:ECHR:1998:0609JUD002429494 (*Twalib/Greece*)
ECtHR 14 December 1999, ECLI:CE:ECHR:1999:1214DEC004473898 (*Dougan/UK*)
ECtHR 2 May 2000, ECLI:CE:ECHR:2000:0502JUD003571897 (*Condron/UK*)
ECtHR (GC) 4 May 2000, ECLI:CE:ECHR:2000:0504JUD002834195 (*Rotaru/Romania*)
ECtHR 6 June 2000, ECLI:CE:ECHR:2000:0606JUD003640897 (*Averill/UK*)
ECtHR 21 December 2000, ECLI:CE:ECHR:2000:1221JUD003472097 (*Heaney and McGuinness/Ireland*)
ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002511694 (*Schöps/Germany*)
ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002447994 (*Lietzow/Germany*)
ECtHR 13 February 2001, ECLI:CE:ECHR:2001:0213JUD002354194 (*Garcia Alva/Germany*)
ECtHR 27 February 2001, ECLI:CE:ECHR:2001:0227JUD003335496 (*Lucà/Italy*)
ECtHR 3 May 2001, ECLI:CE:ECHR:2001:0503JUD003182796 (*J.B./Switzerland*)
ECtHR 16 October 2001, ECLI:CE:ECHR:2001:1016JUD003984698 (*Brennan/UK*)
ECtHR 31 October 2001, ECLI:CE:ECHR:2001:1031JUD004702399 (*Solakov/the Former Yugoslav Republic of Macedonia*)
ECtHR 15 November 2001, ECLI:CE:ECHR:2001:1115DEC004818899 (*Correia de Matos/Portugal*)
ECtHR 31 January 2002, ECLI:CE:ECHR:2002:0131JUD002443094 (*Lanz/Austria*)
ECtHR 21 March 2002, ECLI:CE:ECHR:2002:0321JUD003161196 (*Nikula/Finland*)
ECtHR 20 June 2002, ECLI:CE:ECHR:2002:0620JUD002771595 (*Berlinski/Poland*)

ECtHR (GC) 26 July 2002, ECLI:CE:ECHR:2002:0726JUD003291196 (*Meftah and Others/France*)
ECtHR 15 December 2002, ECLI:CE:ECHR:2011:1215JUD002819809 (*Mor/France*)
ECtHR 14 January 2003, ECLI:CE:ECHR:2003:0114JUD002689195 (*Lagerblom/Sweden*)
ECtHR (GC) 6 May 2003, ECLI:CE:ECHR:2003:0506JUD004889899 (*Perna/Italy*)
ECtHR 28 October 2003, ECLI:CE:ECHR:2003:1028JUD003965798 (*Steur/the Netherlands*)
ECtHR 20 April 2004, ECLI:CE:ECHR:2004:0420JUD006011500 (*Amihalachioaie/Moldavia*)
ECtHR 29 April 2004, ECLI:CE:ECHR:2014:0429JUD000904305 (*Natsvlishvili and Togonidze/Georgia*)
ECtHR 20 January 2005, ECLI:CE:ECHR:2005:0120DEC003059802 *(Accardi and others/Italy*)
ECtHR 20 January 2005, ECLI:CE:ECHR:2005:0120JUD006337800 (*Mayzit/Russia*)
ECtHR 31 March 2005, ECLI:CE:ECHR:2005:0331DEC006211600 (*Mattick/Germany*)
ECtHR (GC) 12 May 2005, ECLI:CE:ECHR:2005:0512JUD004622199 (*Öcalan/Turkey*)
ECtHR 27 september 2005, ECLI:CE:ECHR:2005:0927JUD005088299 (*Petri Sallinen and Others/Finland*)
ECtHR 24 November 2005, ECLI:CE:ECHR:2005:1124JUD005388600 (*Tourancheau and July/France*), *EHRC* 2006/6, m.nt. G. Mols
ECtHR (GC) 1 March 2006, ECLI:CE:ECHR:2006:0301JUD005658100 (*Sejdovic/Italy*)
ECtHR 29 June 2006, ECLI:CE:ECHR:2006:0629DEC005493400 (*Weber and Saravia/Germany*)
ECtHR (GC) 18 October 2006, ECLI:CE:ECHR:2006:1018JUD001811402 (*Hermi/Italy*)
ECtHR 24 October 2006, ECLI:CE:ECHR:2006:1024JUD007084501 (*Taner Kiliç/Turkey*)
ECtHR 30 November 2006, ECLI:CE:ECHR:2006:1130JUD001080704 (*Veraart/the Netherlands*)
ECtHR 8 February 2007, ECLI:CE:ECHR:2007:0208DEC001354004 (*Falter Zeitschriften GMBH/Austria*)
ECtHR 27 March 2007, ECLI:CE:ECHR:2007:0327JUD003243296 (*Talat Tunç/Turkey*)
ECtHR 24 April 2007, ECLI:CE:ECHR:2007:0424JUD003818403 (*Matyjek/Poland*)
ECtHR 16 October 2007, ECLI:CE:ECHR:2007:1016JUD007433601 (*Wieser and Bicos Beteiligungen GmbH/Austria*)
ECtHR 12 November 2007, ECLI:CE:ECHR:2007:0607JUD007136201 (*Smirnov/Russia*)
ECtHR 15 November 2007, ECLI:CE:ECHR:2007:1115JUD002698603 (*Galstyan/Armenia*)
ECtHR 24 January 2008, ECLI:CE:ECHR:2008:0124DEC001715503 (*Coutant/France*)
ECtHR 22 May 2008, ECLI:CE:ECHR:2008:0522JUD006575501 (*Iliya Stefanov/Bulgaria*)
ECtHR 26 June 2008, ECLI:CE:ECHR:2008:0626JUD001559103 (*Seleznev/Russia*)
ECtHR 17 July 2008, ECLI:CE:ECHR:2008:0717JUD000051305 (*Schmidt/Austria*)
ECtHR 22 July 2008, ECLI:CE:ECHR:2008:0722JUD001030103 (*Getiren/Turkey*)
ECtHR 24 July 2008, ECLI:CE:ECHR:2008:0724JUD001860303 (*André and another/France*)
ECtHR 7 October 2008, ECLI:CE:ECHR:2008:1007JUD003522803 (*Bogumil/Portugal*)
ECtHR 9 October 2008, ECLI:CE:ECHR:2008:1009JUD006293600 (*Moiseyev/Russia*)
ECtHR (GC) 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102 (*Salduz/Turkey*)
ECtHR 7 January 2009, ECLI:CE:ECHR:2008:1007JUD003306604 (*Mancevschi/Moldova*)
ECtHR 20 January 2009, ECLI:CE:ECHR:2009:0120JUD002676605 (*Al-Khawaja and Tahery/UK*), *EHRC* 2009/39, m.nt. Dreissen

ECtHR 29 January 2009, ECLI:CE:ECHR:2009:0129JUD007701801 (*Polyakov/Russia*)
ECtHR 19 February 2009, ECLI:CE:ECHR:2009:0219JUD001640403 (*Shabelnik/Ukraine*)
ECtHR 19 March 2009, ECLI:CE:ECHR:2009:0310JUD000437802 (*Bykov/Russia*)
ECtHR 31 March 2009, ECLI:CE:ECHR:2009:0331JUD002031002 (*Plonka/Poland*)
ECtHR 31 March 2009, ECLI:CE:ECHR:2009:0331JUD002102204 (*Natunen/Finland*)
ECtHR 28 April 2009, ECLI:CE:ECHR:2009:0428JUD003888605 (*Rasmussen/Poland*)
ECtHR 9 June 2009, ECLI:CE:ECHR:2009:0609JUD001709503 (*Cihan Öztürk/Turkey*)
ECtHR 9 July 2009, ECLI:CE:ECHR:2009:0709JUD001136403 (*Mooren/Germany*)
ECtHR 9 July 2009, ECLI:CE:ECHR:2009:0409JUD001985604 (*Kolesnichenko/Russia*)
ECtHR 24 September 2009, ECLI:CE:ECHR:2009:0924JUD000702504 (*Pishchalnikov/Russia*)
ECtHR 13 October 2009, ECLI:CE:ECHR:2009:1013JUD000737703 (*Dayanan/Turkey*)
ECtHR 18 February 2010, ECLI:CE:ECHR:2010:0218JUD003966002 (*Aleksandr Zaichenko/Russia*)
ECtHR 1 April 2010, ECLI:CE:ECHR:2010:0401JUD004237102 (*Pavlenko/Russia*)
ECtHR 18 May 2010, ECLI:CE:ECHR:2010:0518JUD002683905 (*Kennedy/UK*)
ECtHR 6 July 2010, ECLI:CE:ECHR:2010:0706JUD003306805 (*Turan/Hungary*)
ECtHR 2 September 2010, ECLI:CE:ECHR:2010:0902JUD003562305 (*Uzun/Germany*)
ECtHR 2 November 2010, ECLI:CE:ECHR:2010:1102JUD002127203 (*Sakhnovskiy/Russia*)
ECtHR 15 February 2011, ECLI:CE:ECHR:2011:0215JUD005672009 (*Heino/Finland*)
ECtHR 5 April 2011, ECLI:CE:ECHR:2011:0405JUD003529205 (*Şaman/Turkey*)
ECtHR 21 April 2011, ECLI:CE:ECHR:2011:0421JUD004231004 (*Nechiporuk and Yonkalo/Ukraine*)
ECtHR 21 June 2011, ECLI:CE:ECHR:2011:0621JUD002965204 (*Orlov/Russia*)
ECtHR 28 June 2011, ECLI:CE:ECHR:2011:0628JUD002019703 (*Miminoshvili/Russia*)
ECtHR 24 November 2011, ECLI:CE:ECHR:2011:1124JUD002700406 (*Zagorodniy/Ukraine*)
ECtHR 13 December 2011, ECLI:CE:ECHR:2011:1213JUD002088309 (*Ajdarić/Croatia*), *EHRC* 2012/55, m.nt. Spronken
ECtHR (GC) 15 December 2011, ECLI:CE:ECHR:2011:1215JUD002676605 (*Al-Khawaja and Tahery/UK*)
ECtHR 10 April 2012, ECLI:CE:ECHR:2012:0410JUD000808805 (*Gabrielyan/Armenia*)
ECtHR 5 July 2012, ECLI:CE:ECHR:2012:0705JUD004171606 (*Golovan/Ukraine*)
ECtHR 10 July 2012, ECLI:CE:ECHR:2012:0710JUD002935306 (*Vidgen/the Netherlands*)
ECtHR (GC) 11 September 2013, ECLI:CE:ECHR:2015:0423JUD002936910 (*Morice/France*)
ECtHR 3 October 2012, ECLI:CE:ECHR:2012:0703JUD003045706 (*Robathin/Austria*)
ECtHR 6 November 2012, ECLI:CE:ECHR:2012:1106JUD003223804 (*Zdravko Stanev/Bulgaria*)
ECtHR 22 November 2012, ECLI:CE:ECHR:2012:1122JUD003931506 (*Telegraaf Media Nederland landelijke media B.V. and others/the Netherlands*)
ECtHR 6 December 2012, ECLI:CE:ECHR:2012:1206JUD001232311 (*Michaud/France*)
ECtHR (GC) 11 September 2013, ECLI:CE:ECHR:2015:0423JUD002936910 (*Morice/France*)
ECtHR 10 October 2013, ECLI:CE:ECHR:2013:1010JUD005135510 (*Topić/Croatia*)
ECtHR 14 October 2014, ECLI:CE:ECHR:2014:1014JUD004544004 (*Baytar/Turkey*)

ECtHR 18 November 2014, ECLI:CE:ECHR:2014:1118JUD001506507 (*Aras/Turkey (no. 2)*)
ECtHR 16 December 2014, ECLI:CE:ECHR:2014:1216JUD005054108 (*Ibrahim and others/UK*)
ECtHR 12 February 2015, ECLI:CE:ECHR:2015:0212JUD000567806 (*Yuditskaya and others/Russia*)
ECtHR 19 February 2015, ECLI:CE:ECHR:2015:0127DEC002922211 (*Fuchs/Germany*)
ECtHR 9 April 2015, ECLI:CE:ECHR:2015:0409JUD003046013 (*A.T./Luxembourg*)
ECtHR (GC) 23 April 2015, ECLI:CE:ECHR:2015:0423JUD002936910 (*Morice/France*)
ECtHR (GC) 20 October 2015, ECLI:CE:ECHR:2015:1020JUD002570311 (*Dvorski/Croatia*)
ECtHR 27 October 2015, ECLI:CE:ECHR:2015:1027JUD006249811 (*R.E./UK*)
ECtHR (GC) 4 December 2015, ECLI:CE:ECHR:2015:1204JUD004714306 (*Roman Zakharov/Russia*)
ECtHR (GC) 15 December 2015, ECLI:CE:ECHR:2015:1215JUD000915410 (*Schatschaschwili/Germany*)
ECtHR 15 December 2015, ECLI:CE:ECHR:2015:1215JUD002902411 (*Bono/France*)
ECtHR 17 March 2016, ECLI:CE:ECHR:2016:0317JUD000719304 (*Zakshevskiy/Ukraine*)
ECtHR 12 January 2016, ECLI:CE:ECHR:2016:0112JUD003753713 (*Borg/Malta*)
ECtHR 12 January 2016, ECLI:CE:ECHR:2016:0112JUD004807410 (*Rodriguez Ravelo/Spain*)
ECtHR (GC) 23 March 2016, ECLI:CE:ECHR:2016:0323JUD004715206 (*Blokhin/Russia*)
ECtHR (GC) 13 September 2016, ECLI:CE:ECHR:2016:0913JUD005054108 (*Ibrahim and others/UK*)
ECtHR 10 November 2016, ECLI:CE:ECHR:2016:1110JUD004801606 (*Sitnevskiy and Chaykovskiy/Ukraine*)
ECtHR (GC) 12 May 2017, ECLI:CE:ECHR:2017:0512JUD002198004 (*Simeonovi/Bulgaria*)
ECtHR 25 July 2017, ECLI:CE:ECHR:2017:0725JUD000215610 (*M.M./the Netherlands*)
ECtHR 8 March 2018, ECLI:CE:ECHR:2018:0308JUD003477909 (*Dimitar Mitev/Bulgaria*)
ECtHR (GC) 9 November 2018, ECLI:CE:ECHR:2018:1109JUD007140910 (*Beuze/Belgium*)
ECtHR 28 May 2019, ECLI:CE:ECHR:2019:0528JUD002319215 (*Kolk/the Netherlands*)
ECtHR 11 July 2019, ECLI:CE:ECHR:2019:0711JUD003082813 (*Bloise/France)*
ECtHR 11 July 2019, ECLI:CE:ECHR:2019:0711JUD006231312 (*Olivieri/France*)
ECtHR 15 October 2019, ECLI:CE:ECHR:2019:1015JUD000139907 (*Mehmet Ali Eser/Turkey*)

Dutch (Disciplinary) Case Law

Disciplinary Tribunal

RvD Den Bosch 9 May 1994, *Advocatenblad* 1995, p. 122
RvD Amsterdam 16 June 2008, 08-046A (unpublished)
RvD Amsterdam 24 August 2009, 09-015A, ECLI:NL:TADRAMS:2009:YA0037
RvD Amsterdam 27 October 2009, 09-044U, ECLI:NL:TADRAMS:2009:YA0117
RvD Amsterdam 2 February 2010, 09-178U, ECLI:NL:TADRAMS:2010:YA0350
RvD Amsterdam 2 February 2010, 09-186U, ECLI:NL:TADRAMS:2010:YA0351
RvD The Hague 14 June 2010, 3357/09.189, ECLI:NL:TADRSGR:2010:YA0901
RvD Arnhem 12 July 2010, 10-45, ECLI:NL:TADRARN:2010:YA1015

RvD 's-Gravenhage 4 July 2011, 3628/11.30, ECLI:NL:TADRSGR:2011:YA1828

Disciplinary Appeal Tribunal
HvD 26 September 1983, 662, *Advocatenblad* 1984, p. 248
HvD 14 February 2011, ECLI:NL:TAHDV:2011:YA1407
HvD 17 December 2012, 6338, ECLI:NL:TAHVD:2012:YA4469
HvD 1 December 2008, 4987 (not published)

English Case Law

Rondel v Worsley [1969] 1 AC 191 (HL)
R./Turner [1970] 54 Cr. App. R. 352 CA (Crim. Di/)
Arthur J.S. Hall and Co. v Simons (AP) [2000] UKHL 38, [2002] 1 AC 615
Medcalf v Mardell [2002] UKHL 27, [2003] 1AC 120, [2002] 3 All ER 721 (27 June 2002)
R/Howell [2003] EWCA Crim 01
R/Hoare and Pierce [2004] EWCA Crim 784
R/Beckles [2004] EWCA Crim 2766
R v G & B [2004] EWCA Crim 1368, and [2004] 2 Cr App R 37
R v Momodou [2005] EWCA Crim 177, [2005] 2 Cr App R 6
Lumsdon & Ors v Legal Services Board [2014] EHWC 28 (Admin)
R v H [2004] UKHL 3; [2004] 2 AC 134
R v Ensor [2009] EWCA Crim 2519
R (on the application of Lumsdon and others) v Legal Services Board [2014] EWCA Civ 1276
R/Good (Alfie) [2016] EWCA Crim 1054

CURRICULUM VITAE

Marelle Françoise Attinger (Alphen aan den Rijn, 1980) studied Dutch law at Maastricht University. In 2004, she obtained her master's degree in Dutch Law, and in 2005, she successfully finished the post-doctoral programme 'TogaMaster' at Maastricht University. During her studies, Marelle worked as a student assistant for the *Advocatenpraktijk* of Maastricht University and as a volunteer and member of the board of the *Stichting Vrouwenrechtswinkel Maastricht*.

From 2005 to 2006 Marelle was research assistant to Prof. mr. dr. Taru Spronken. In this capacity, she participated in the European Arrest Warrant Project of the European Criminal Bar Association for which she set up a project website. She also conducted comparative research into procedural safeguards for suspects for the European Commission together with Prof. mr. dr. Taru Spronken.

In 2007, Marelle started her Ph.D. project and at the same time started as junior lecturer in criminal law at Maastricht University. In 2011 Marelle obtained her University Teaching Qualification (*Basiskwalificatie Onderwijs* – BKO). In her career as lecturer, Marelle gradually expanded her interests to professional ethics, human rights and practical skills for legal practitioners. In 2012, Marelle switched from Maastricht University to the Open University in Heerlen as a lecturer in criminal (procedural) law and human rights. In 2017, the students elected her as OU Teacher of the Year.

Marelle currently lives in Maastricht with her husband Kim and their three children, Douwe, Dennis, and Dalí.

Open Universiteit
www.ou.nl

Cross-border crime is ever increasing, so that more intensive cooperation between police and judicial authorities of the EU Member States is necessary in order to effectively combat such crime. This also means that criminal defence lawyers will be more and more involved in cross-border defences. Consequently, it is to be expected that criminal defence lawyers will also increasingly cooperate with their peers in other EU Member States. In that regard it is important for criminal defence lawyers to be knowledgeable not only about the criminal procedural regulations of other Member States, but also about the deontological regulations that govern their peers in other Member States.

This research aims to provide an overview of the deontological regulations relevant for the conduct of criminal defence lawyers across the EU and to determine whether these relevant regulations contribute to an effective defence. To this end, an EU-wide inventory has been made of all rules of conduct that are relevant to criminal defence lawyers who assist suspects in criminal proceedings. Subsequently, it was researched whether and to what extent these rules contribute to an effective defence by comparing these rules with a normative framework of minimum procedural and deontological safeguards for an effective defence.

On the basis of this research, 15 essential components for an EU system of regulations governing the conduct of criminal defence lawyers could be defined. These components actually clarify the contours of the four roles that criminal defence lawyers fulfil when assisting suspects and accused in criminal proceedings: legal representative, strategic adviser, trusted counsellor and spokesperson. Moreover, these components can serve as a catalyst for future debate, by challenging criminal lawyers, academics and (both national and European) legislators to reconsider the existing role and position of the actors in criminal procedure.